I. INTRODUCTION

In recent years, critics have accused the Rehnquist Court of practicing a politically conservative version of the very judicial activism for which supporters of the current Court often attack the Warren Court. These critics have pointed to instances in which the Rehnquist Court has eschewed traditional procedural principles of constitutional adjudication, such as the principle that the Court should decide cases on constitutional grounds only when absolutely necessary. Critics have also attacked the Rehnquist Court for straining to
give the Constitution a broad, substantive reading in order to reach political results.\(^3\)

Although I wholeheartedly agree with these criticisms, this Foreword focuses on a more general failure of the Rehnquist Court's jurisprudence, one that has not received much popular or scholarly attention: the Court's disregard for two traditional approaches to judicial review that often more effectively protect fundamental rights — whatever their content — than currently prevailing approaches. The past Term was no exception.

At the core of the modern Western political tradition lies the notion that there are certain things government should not do, certain places it should not go — except in the most extreme circumstances. In referring to these figurative "things" and "places," people often use the language of "fundamental rights." But what is the best way to protect such rights? To what extent should we allow majoritarian legislatures and elected executives\(^4\) to police themselves and to what extent should we instead rely on more independent, perhaps less representative bodies, such as courts, to keep legislatures and executives in bounds? The general power of courts to keep legislatures and executives from violating fundamental rights is what many people, including myself, mean by the power of judicial review.\(^5\) The central object of this

\(^3\) See infra pp. 137–40 (discussing the various excesses of the Rehnquist Court).

\(^4\) Although I refer here to legislatures and executives, I am equally concerned with other government action such as that of administrative agencies and government bureaucrats. As shorthand, however, I use the terms "legislatures" or "political processes" to refer to all forms of nonjudicial governmental action.

\(^5\) An alternative, but ultimately untenable, definition conceives of judicial review as the power conferred upon judges to enforce the Constitution because it is properly enacted law, regardless of its terms or implications for rights. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA 143–44 (1990); Edwin Meese, III, Speech Before the American Bar Association (July 7, 1989), in MAJOR POLICY STATEMENTS OF ATTORNEY GENERAL EDWIN MEESE, III, 1985–1988, at 1, 7 (1989). This conception may help explain why judges instead of legislatures should enforce such conventional constitutional provisions as that requiring the President to be at least 35 years old. See U.S. CONST. art. II, § 1, cl. 5. Yet as an exhaustive conception, it is clearly inadequate. It would enforce a static conception of rights that could not evolve over time; moreover, strict adherence to the text of the Constitution would require a more limited judicial role than has ever been practically possible. Even enforcement of such traditional concepts as the "separation of powers" requires going beyond the literal text of the Constitution. See Metropolitan Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 111 S. Ct. 2298, 2317–18 (1991) (White, J., dissenting) (criticizing the majority, which had relied on separation of powers doctrine, for "expanding nontextual principles"). As a practical matter, our polity has always relied on judges to play a role in the enforcement of some categories of rights or principles not explicitly declared in the Constitution. Finally, as an historical matter, there can be no doubt that Americans have come to rely on constitutional law to help protect rights beyond those covered by a cramped and literalist interpretation of the text of the Constitution. Interestingly, Bruce Ackerman's theory of constitutional moments, to which I return throughout this Foreword, could be interpreted as a synthesis of both the rights-based and positivistic conceptions. See infra note 80.

In this Foreword I am frequently severely critical of Robert Bork's views. He and I have
Foreword is to take yet another look at what mix of judicial and legislative power produces the optimal protection of fundamental rights.

What makes the answer to this question so problematic is that both courts and legislatures may terribly abuse their power to protect fundamental rights. Each may serve its own purposes or its own class or caste interests. Thus, the issue inevitably becomes under what circumstances is each most needed to protect fundamental rights, and under what circumstances is each more threatening to rights. Part II of this Foreword surveys what I regard as the four basic approaches to judicial review, the relation that each has to fundamental rights, and the role that each gives to judges. The first approach — which I refer to in shorthand as Type I — emphasizes a decisive judicial role and requires that, however rights are defined, judges ultimately be responsible for enforcing them against government action. At the other extreme, the pure majoritarian deference approach, Type IV, allows the political processes to develop, define, and enforce fundamental rights and leaves judges only the task of interpreting and enforcing the parameters of the rights that "ordinary" politics establishes.

Two middle approaches, Types II and III, have been largely ignored by the current Court. These approaches, however, have much

---

long disagreed on most issues of law while remaining friends. Because he was, in my judgment, unfairly caricatured and attacked by those who, perhaps understandably, wished to defeat his Supreme Court nomination, I would like to reaffirm that my criticism should in no way associate me with the ad hominem attacks that were made on him.

6 "Ultimately" is, in fact, too strong a word. As Alexander Bickel long ago suggested, even a Type I judicial decision is by no means the end of the process of constitutional lawmaking. See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 264 (1962) (discussing how opponents of Brown v. Board of Educ., 347 U.S. 483 (1954), "[i]f they succeeded in turning public opinion could realistically look to the day when the principle announced by the Court would be rescinded or allowed to lapse without enforcement"). Amendments, both formal and informal, can alter the Constitution and reject almost any "right" the courts have asserted. Virtually the whole of our Constitution can be formally amended with the concurrence of two-thirds of the Congress and three-fourths of the states. See U.S. CONST. art. V; see also infra note 91 (discussing in part the formal unamendability of some parts of foreign constitutions and the limitations on formal amendability in the United States Constitution). De facto or informal amendment can occur in a variety of interestingly complex ways. See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 283 (1991) (arguing that the Constitution has been transformed, although the "modern" path of constitutional revision differs from that of the "classical"); BICKEL, supra, at 259-61 (distinguishing between Lincoln's belief that the decision in Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856), was "wrong," and translation of that belief into active "resistance" against the Supreme Court); Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1044 (1988). Many philosophers and judges dedicated to fundamental rights fail to consider the significance of constitutional amendability for their theories. Ackerman criticizes this blindness as a failure of both "monist" and "foundationalist" members of the "fundamental rights" school. See ACKERMAN, supra, at 10-12.

7 See infra pp. 108-09.
to commend them. They are not only well established historically as methods for safeguarding those rights most likely to be left unprotected by legislatures, but they also reduce the danger of judicial autocracy. Type II judicial review gives judges the authority to invalidate government action only when it violates what I refer to as the antidiscrimination principle. Type III judicial review gives courts the power to send back for reconsideration any governmental action that arguably violates some fundamental right whenever that action seems either the product of undue haste on the part of the decisionmakers or the product of what I refer to as "hiding."

Part III examines the varying emphases placed on these prototypes of judicial review in different polities, particularly in Canada, England, and the United States. The comparisons serve to show that, despite the recent emphasis on Type I review in American jurisprudence, the other prototypes can play a vital role in functioning polities. In Part III, I also speculate a bit on why the different nations seem to emphasize different approaches to judicial review. My ultimate purpose in this Foreword, however, is polemical, not comparative. I argue that despite the popular and scholarly focus on Type I judicial review in the United States, Type II and Type III approaches have been crucial to American constitutional jurisprudence — albeit not always explicitly.

Part IV of this Foreword examines and evaluates some of the normative assumptions underlying the four approaches to judicial review, assumptions about the relative effectiveness and trustworthiness of judicial versus legislative power with respect to different types of government actions. In particular, Part IV argues that Type II and Type III judicial review deserve reinvigoration by U.S. courts, and that this should be so regardless of whether one starts with a narrow or broad conception of Type I judicial review — whether one is former Judge Robert Bork or whether one is former Justice William Brennan.

Part V then offers a discussion of several cases, including some from the past Term, in which the Rehnquist Court has failed to recognize the merits and applicability of Type II and Type III approaches. Part V concludes with my belief that this collection of missed opportunities ranks along with the Rehnquist Court's failure to control procedural abuses in criminal trials as the current Court's greatest failure and that, like the Court's retrograde view of procedural due process, this failure can ultimately be explained only by an activist outlook of the most virulent and blinding sort.

---

8 I make no claim of causation, however. That is, the English or Canadian or United States constitutions may be what they are because those polities have a given view of rights enforcement. But it is also possible that the constitution of each arose through a series of almost chance events and compromises and that the existence of that kind of constitution was itself responsible for the view of rights enforcement that prevails in each polity.
In this Foreword, I am not primarily concerned with the existence and nature of fundamental rights. It is precisely the indeterminacy of such an inquiry — theorists and judges have yet to reach any sort of consensus on what counts as a fundamental right — that strongly commends the use of alternative modes of judicial review in addition to Type I review. In any event, the definition of fundamental rights and the judicial enforcement of those rights are two very different inquiries. The latter inquiry is concerned not only with outlining a theoretical notion of fundamental rights, but also with determining who should enforce those rights. In any given polity, with its own peculiar traditions, demography, and history, rights could be enforced by judges — who usually come from a particular social class with a particular education and who are often appointed for life — or by the political processes generally, that is, by majoritarian legislatures, elected executives, administrative bureaucrats, or referenda voters. Of course, the choice is not exclusive; rights could be enforced by all of these concurrently or by each of them at particular times and under particular circumstances.

There is nothing particularly new in all this; indeed, John Hart Ely’s seminal book on judicial review could be said to depend on just this distinction. Nonetheless, many distinguished philosophers and philosopher-lawyers still fail to separate these two issues. The assertion of a “fundamental right,” such as my right to my body and its parts, becomes conflated with a constitutional right protected by a court that in practical terms has the last say in the matter. Substitute “property” or “contractual” rights for body parts, and the issues smell

9 See John H. Ely, Democracy and Distrust (1980). Indeed, much of this Foreword could have been written in the language of the legal process school, of which Ely is a distinguished member. The legal process school asks which institutions are best suited to do which job in a given polity. It also asks what controls or roadblocks should be put in the way of any institution to prevent abuses of power.

The general problem with the legal process approach, however, is that it premises that such questions can be answered without an underlying substantive theory of rights. Indeed, Ely’s otherwise extraordinary book can justly be criticized for shading this point. But cf. Frank I. Michelman, Welfare Rights in a Constitutional Democracy, 1979 Wash. U. L.Q. 659, 677–79 (deriving substantive minimal entitlements from Ely’s premises). Without a theory of rights — a theory outlining what they are, where they come from, and how they are defined — it is impossible to know what institutions are best suited to articulate and defend them. Of course, one can duck this task — as I do here — by looking to particular polities and seeing what their views of rights are and hence what process decisions seem appropriate for each polity. Even if the outer boundaries of such rights are difficult to define, the core values in any polity, including our own, are relatively easy to identify. Far from negating the importance of an adequate theory of rights, my approach emphasizes the need for such a theory in order to complete any legal process analysis. It is equally true, however, that the initial definition of particular rights as fundamental does not answer the legal process question.

10 See, e.g., Ronald Dworkin, Law’s Empire 355–413 (1986); Laurence H. Tribe, American Constitutional Law § 1-9, at 15–17 (2d ed. 1988); see also Ackerman, supra note 6, at 11–13 (claiming that conservatives, liberals, and collectivists have all been guilty of failing to distinguish between the two issues).
of old "New Deal" conflicts and seem somewhat dated, although in fact they remain the same. Fundamental rights, as I use the term, should not be conflated with constitutional rights. They may be broader than those rights properly entrusted to courts for protection. Conversely, there undoubtedly are some rights embedded in the Constitution and enforced by courts that few, if any, would deem fundamental.

Notice that the question also remains the same regardless of what the initial entitlement is. A libertarian society may believe each person should have a fundamental right to his or her kidneys or land. A communitarian society may wish to hold fundamental the right of those who need a transplant or property to get kidneys or land from those who happen to possess them. Societies, of course, may be hybrids; they may be libertarian with respect to some categories of rights and communitarian with respect to others. In each case the

---

11 Before the New Deal, the Supreme Court protected property and contractual rights under the doctrinal rubric of substantive due process, an approach illustrated most famously by the decision in Lochner v. New York, 198 U.S. 45 (1905), in which the Court invalidated a statute limiting bakery workers' hours to 10 hours per day and 60 hours per week, see id. at 52-53. The doctrine's collapse during the New Deal is usually said to have occurred in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which upheld a state statute establishing minimum wages for women, see id. at 391-400. United States v. Carolene Products Co., 304 U.S. 144 (1938), which sustained a federal ban on interstate shipment of filled milk, see id. at 154, set the modern standard of judicial deference to economic regulation.

12 So far, courts in the United States have reflected American society's generally libertarian bent concerning people's bodies. See, e.g., McFall v. Shimp, 10 Pa. D. & C. 3d 90, 91 (1978) (holding that forcing someone to undergo compatibility tests to determine whether the person would be a suitable bone marrow donor would "change every concept and principle upon which our society is founded"). See generally Guido Calabresi, Do We Own Our Bodies?, 1 HEALTH MATRIX 5, 5-6 (1991) (discussing McFall).

Despite its rather dramatic language, however, the court in McFall did not decide whether the entitlement was a constitutional right, because the issue was not before it. The question whether the legislature could validly change the entitlement — in effect, give the right to bone marrow to the person who needs a transplant — has, to my knowledge, never been decided by an American court.

13 Consider again the example of the right to body parts. In the United States, at least, most people assume that their bodies are their own and cannot be taken by the community for its purposes or to help others. At the same time, most Americans also accept compulsory military service in wartime. The Court went even further in a communitarian direction in United States v. Stanley, 483 U.S. 669 (1987). There the Court held that no remedy against the state was available to a master sergeant who was involuntarily subjected to LSD experiments, because the "unique disciplinary structure" of the military counseled judicial deference. Id. at 683-84 (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)). To use the Calabresi-Melamed terminology, the soldiers in Stanley did not have an entitlement protected by a "liability rule," let alone by a "property rule." See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1059, 1106-10 (1972). Similarly, state laws against abortion can be seen as examples of a communitarian approach under which women's bodies — and, significantly, only women's bodies — are "taken" for a common "good," for the sake of the lives of fetuses. The same can also be said of state rules requiring pregnant women to behave in certain ways to "protect" an unborn child. See Dorothy E. Roberts, Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, 104 HARV. L. REV. 1419, 1428-32 (1991); Tamar Lewin, Court in
issue remains: should courts or legislatures or some mixture of each protect this right, this starting point, from those who would use their political influence or legal acumen to undermine it.

II. Four Approaches to Judicial Review

A. Type I: Judicial Supremacy

Perhaps the most salient description of this model of judicial review comes from James Madison's statement, beloved of Justice Black, that with a written constitution "independent tribunals of justice . . . will be an impenetrable bulwark against . . . every encroachment upon rights expressly stipulated for in the Constitution."\textsuperscript{14} The explicit adoption of Type I review by the Supreme Court dates to a few years later in Marbury v. Madison.\textsuperscript{15}

Type I judicial review has many forms and adherents. For one group of adherents, today often politically conservative, this approach limits itself strictly to the "original" rights "enumerated" in the Constitution. There are, however, significant differences of opinion within

---

\textsuperscript{14} Chapman v. California, 386 U.S. 18, 21 n.4 (1967) (Black, J.) (quoting 1 Annals of Cong. 439 (Joseph Gales ed., 1789)); see also The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (describing the courts as "the bulwarks of a limited Constitution against legislative encroachments"). The quotation in the text is not meant to suggest that Madison was a strict adherent to Type I. Indeed, Madison is often remembered for his emphasis on the importance of a national legislature as a guardian against encroachments on fundamental rights. See The Federalist No. 10, at 80–83 (James Madison) (Clinton Rossiter ed., 1961). For his part, Justice Black was a strong Type I adherent, but only within very circumscribed boundaries. I discuss Justice Black's constitutional theory below. See infra notes 17, 167, 169 and accompanying text.

\textsuperscript{15} 5 U.S. (1 Cranch) 137, 176–80 (1803).
this group concerning how to find such original, enumerated rights. Some point to the adamantine notion of "original intent."\textsuperscript{16} Others, like Justice Scalia, are somewhat more flexible, and look instead to the Founders' language, which is inevitably subject to reinterpretation and reconstruction.\textsuperscript{17} Still others, such as former Judge Robert Bork

\textsuperscript{16} Former Attorney General Edwin Meese has taken the position that fundamental rights should be limited to entitlements the Framers specifically intended to hold fundamental. \textit{See, e.g.,} Edwin Meese, \textit{III, The Supreme Court of the United States: Bulwark of a Limited Constitution,} 27 S. TEX. L.J. 455, 464-66 & n.60 (1986). But it is not even certain how one could determine original intent. \textit{See, e.g.,} DWORKIN, \textit{supra} note 10, at 359-63 (arguing that determining intent is a logically incoherent task with respect to recent statutes, let alone the Constitution); LEONARD W. LEVY, \textit{ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION} at xii, 389 (1988) (arguing that determining the Framers' intent is an historically problematic task). If it were possible to determine a fixed original intent, such an intent, precisely because it would be static even though the world changed, would overprotect some rights and leave others totally outside the constitutional framework, except for the possibility of amendments. \textit{Cf.} H. Jefferson Powell, \textit{The Original Understanding of Original Intent,} 98 HARV. L. REV. 885, 935-36 (1985) (arguing that the Framers themselves did not expect the Constitution to be interpreted according to evidence of their intentions, at least partly because they wanted to preserve some flexibility in the document).

\textsuperscript{17} Justice Antonin Scalia and Justice Hugo Black have been the principal proponents of a view of rights that finds its base and its limits in the language of the charter. Examples of Justice Black's perspective can be found in many cases. \textit{See, e.g.,} \textit{In re Winship,} 397 U.S. 358, 377 (1970) (Black, J., dissenting); Rochin v. California, 342 U.S. 165, 175 (1952) (Black, J., concurring); Adamson v. California, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

Justice Scalia's emphasis on constitutional language derives from a more general belief that legislative intent is generally impossible to find and that we have little choice but to let language govern. \textit{See, e.g.,} Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2490 (1991) (Scalia, J., concurring) (eschewing the use of legislative history and stating that "we are a Government of laws not of committee reports").

The majority of the Court, of course, explicitly rejected Justice Scalia's strict view. \textit{See Mortier,} 111 S. Ct. at 2485 n.4. Civil law countries, whose law has been primarily statutory, have similarly rejected such a strict approach. \textit{See, e.g.,} William N. Eskridge, \textit{Public Values in Statutory Interpretation,} 137 U. Pa. L. Rev. 1007, 1012 (1989) (stating that "[c]ivil law interpretation is different in its more systematic tendency to seek coherence across statutes"). Even in common law jurisdictions such as Britain, where text-bound literalism once had its strongest following, this method of legal interpretation is now regarded as foolish. British common law courts are willing to reach beyond statutory language. \textit{See cases cited infra} note 155.

Nevertheless, plain language interpretivism allows the Constitution to grow more than a Meese-like approach, under which the meaning of words stays fixed at an imputed original intent. Just as "fault" in the twentieth century, \textit{see} Delair v. McAdoo, 188 A. 181 (Pa. 1936) (finding defendant negligent for not checking a worn tire before driving his car and then having a blow-out that caused a collision), has little to do with what was "fault" in the nineteenth century, \textit{see} Holmes v. Mather, 10 L.R.-Ex. 261 (1875) (accepting a jury verdict of no negligence when the defendant, who had used the public streets to exercise his horses in double harness for the first time, was unable to control them), and may only by chance have some similarities to what was "fault" in the seventeenth century, \textit{see} Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1616) (holding that showing absence of fault requires a showing that the plaintiff hit the defendant or that the defendant was used by a third party as an instrument), the plain language of the Constitution inevitably acquires new meaning over the years.

Despite Justice Scalia's protestations, however, plain language interpretivism does not
(before the Senate's failure to confirm his appointment to the Supreme Court), rely on a broader concept which might be termed "structural" or "functional" intent.  

strengthen the position of democratically elected legislators (or constitutional conventions) against judges and thus cannot be defended on this ground. The precise language used in statutes or constitutions is rarely the product of representative democracy, but rather of chance, hired drafters, or of arbitrarily selected "committees on style." To be sure, the majority of a convention or a legislature must formally approve the language, but such final votes are often pro forma and are rarely genuinely deliberative. Cf. House Approves Budget Formula, CHI. TRIB., Oct. 28, 1990, at 17 (noting that the House passed the second largest tax increase in history in the middle of the night, without members having had a chance to read the bill); Anne Wexler, Son of Gramm-Rudman, WASH. POST, Oct. 28, 1990, at C7 (criticizing Congress's hurried, late-night passage of deficit-reduction legislation without adequate deliberation).

If one reads behind Justice Scalia's remarks, his defense lies not so much in the capacity of language to restrict judges and restore legislative authority, but rather in its capacity to restrict both courts and legislator-framers. My guess is that the appeal of language to Justice Scalia is similar to the appeal of the gold standard: let us rely on something relatively fixed, arbitrary even, and government in general will be restricted. It does not matter that the gold standard resulted in the greatest inflations and depressions known; it is still preferable to flexible monetary policy, because people are bound to fail. Fortunately, not everyone shares such a deeply pessimistic view of human nature.

Interestingly, some have suggested that the inevitable effect of such restrictions on legislatures and courts is to add to presidential power (what else is left?). See Peter L. Strauss, Legal Process and Judges in the Real World, 12 CARDozo L. REV. 1653, 1656 (1991) (arguing that when agencies use a textualist approach in interpreting their own statutory mandates, they free themselves from legislative politics and thereby increase the power of the executive vis a vis the legislative branch).

Ultimately, however, the most salient observation to make about Justice Scalia's approach, as Justice Black knew quite well, is that language is simply not very restrictive (even apart from changes of meaning over time). One need not follow those current scholarly views that argue that language provides little or no constraints on courts at all, see, e.g., SANFORD LEVINSON, CONSTITUTIONAL FAITH 191-93 (1988); MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 60-69 (1988), to realize how much power a language standard in fact gives to the interpreters, that is, to the courts. It is as if we had a gold standard in which the Federal Reserve Board controlled the supply of gold. Inevitably, Justice Scalia himself does not hesitate to use that power — how could he help it? For an example of Justice Scalia's willingness to exploit the power of statutory construction, see Church of Scientology v. IRS, 792 F.2d 153 (D.C. Cir. 1986) (en banc), aff'd, 484 U.S. 9 (1987). There a divided court held that a statute that authorizes release of IRS information only "in a form which cannot be associated with . . . a particular taxpayer," I.R.C. § 6103(b)(x)(B) (1988), also requires that the material must first be "reformulated" by the government. See Church of Scientology, 792 F.2d at 169-71. No statutory language required this interpretation, and the legislative history indicated a contrary intent. See id. at 172 (Wald, J., dissenting). Having said all of this, language linked to the original charter clearly imposes some limits, as Justice Black also knew. It is these limits that many scholars and judges (such as Justice Brennan) have in recent years found not to their liking.

18 Former Judge Bork, at least before he was denied confirmation, seemed to ask: what values were the Framers concerned with and how do these values apply to the modern world? This approach can be seen, for example, in Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985), in which Judge Bork argued for according politically significant libellous newspaper writings First Amendment protection even though the language of the First Amendment did not cover such writings and the specific intent of the
The other principal group of Type I adherents, typified generally by former Justice Brennan, would accord Type I protection to a far broader set of rights, however tenuous the link between rights and the language of the original charter or the intent of the Framers. Again, however, internal differences abound concerning how to determine these rights. Some regard fundamental rights as arising from the changing vision of philosophers and "enlightened" jurists; others regard them as changing not at the whim of judges and philosophers but, as Professor H.L.A. Hart of Oxford says of morality generally, slowly over time and not in response to any single argument or event. Still others would justify a Type I approach to protect rights they derive from vague or general language associated with the framing of the Constitution. Adherents of unenumerated "structural rights," as well as proponents of rights linked to the Declaration of

Framers was not to protect individuals from private libel suits. See id. at 995–98 (Bork, J., concurring).

This position is as different from Meese's as rule utilitarianism is from case utilitarianism. If Bork were not quite so constipated in his finding of the Framers' structural intent, see Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 22 (1971) (arguing that the Framers "appear not to have been overly concerned" with free speech and often sought to punish speech they considered dangerous to the government), many of his critics would find his approach acceptable and would perhaps share it. See, e.g., CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 39–47 (1969) (arguing that the structure of the Constitution prohibits state interference with freedom of speech, apart from the First Amendment). Contemporary "structural" approaches can be traced back to Charles Black. See, e.g., ELY, supra note 9, at 225 n.48 (acknowledging indebtedness to Charles Black's structural view); see also infra note 97 (discussing structural rights in the United States and abroad). The structural intent theory remains, of course, subject to some of the criticisms levelled against originalism in general. See supra note 16.

Bork's writings since his hearings suggest a narrowing of his already strict views. See BORK, supra note 5, at 165–66 ("[W]hen the original understanding really is lost . . . the judge should refrain from working.").


20 See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 137 (1977) (discussing "the program of judicial activism"); TRIBE, supra note 10, at vii, § 1-8, at 14–15; Bruce Ackerman, Constitutional Politics/Constitutional Law, 99 YALE L.J. 453, 488-90 (1989); Brennan, supra note 19, at 166.

21 See H.L.A. HART, THE CONCEPT OF LAW 172 (1961) ("[M]orals and traditions cannot be directly changed . . . by legislative enactment . . . [B]ut the enactment or repeal of laws may well be among the causes of a [gradual] change or decay of some moral standard or some tradition."). This last view of rights, linked philosophically to Edmund Burke, is similar to the one that Alexander Bickel came to hold. See, e.g., ELY, supra note 9, at 71–72 (arguing that this was Bickel's view). It had great influence on Justices Felix Frankfurter and John Marshall Harlan as well. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 501–02 (1965) (Harlan, J., concurring); Rochin v. California, 342 U.S. 165, 169 (1952) (Frankfurter, J.) (linking due process to the evolving canons of decency among English-speaking peoples); Adamson v. California, 332 U.S. 46, 67–68 (1947) (Frankfurter, J., concurring).

22 See, e.g., BLACK, supra note 18, at 39–47; ELY, supra note 9, at 88–104. Some suggest that all Type I rights are structural rights designed to make legislatures more democratically responsible. I do not think so. See infra note 167.
Independence's reference to "the Laws of Nature and of Nature's God," fit into this category.\(^{23}\) For all of these Type I proponents, however, rights are trumps — while they last — and courts must protect them.\(^{24}\) For example, if the Court decides that I have a right to my body or my land, any legislative act that removes these from me must ultimately fall, unless and until the Constitution itself is changed or falls. Even when rights conflict, this approach to judicial review — in its pure form — would say that it is up to courts to decide which trump is higher. Given the stakes here, it is not surprising that the issue of what rights are becomes the critical conflict between the warring Type I camps, between the Borks and Brennans.

The judicial supremacy approach to judicial review can accommodate a communitarian society as easily as it can our own largely libertarian one. In a communitarian society, philosophers and judges might plausibly maintain that as a matter of fundamental right my body or my property belongs to the ill or to those who need and would use my land. Until and unless the society's constitution is changed or falls, Type I judicial review would require courts to strike down any legislative act that would allow me to keep my body parts or my land from those in need. Once again, courts will be an impenetrable bulwark against any encroachment upon the rights of the people.\(^{25}\)
Type II judicial review agrees that the people have fundamental rights, but maintains that by and large legislatures are less dangerous than judges in defining and enforcing them — with one fundamental exception. When an identifiable social group has been consistently and significantly underrepresented or in other ways excluded from the legislative process, traditional political processes cannot be relied upon to protect that group. The courts must therefore step in to guard the group from unjustified selective treatment, that is, discrimination. The group must not be just a temporary political loser. It must have experienced a history of discrimination or must face a real danger of long-run exclusion. To constitute a violation of the antidiscrimination principle, which is obviously closely linked to John Hart Ely's concept of representation-reinforcing judicial review, the selective treatment must also affect the underrepresented group in ways that courts deem fundamental.

Under this view of judicial review, for instance, if men could become pregnant, anti-abortion laws would be clearly valid; because men cannot, such laws must be subject to judicial scrutiny. Women count as an excluded group, or at least did at the time of Roe v. Wade, and anti-abortion laws impose a degree of control over women's lives and behavior that is not imposed on men. It is, of course, no answer to argue that if men became pregnant, anti-abortion laws would not exist. Indeed, that is just the point. Similarly, consider a law requiring people who are optimal donors to give up their bone marrow for transplant. Under a Type II approach, such a law would generally be valid, although one may doubt whether such a law could ever be passed in our relatively libertarian society absent dramatic changes in social attitudes. And again, the general belief in the

---

GLOBE, Oct. 31, 1988, at 9 (noting a high reelection rate for congressional incumbents and "huge advantages" for incumbents in mailing, fundraising, and media access); cf. Baker v. Carr, 369 U.S. 186, 258 (1962) (Clark, J., concurring) ("If present [apportionment] representation has a policy at all, it is to maintain the status quo . . . at any cost."); Robert D. Hershey, Jr., Members' Conduct May Be in Line but Out of Step, N.Y. TIMES, June 21, 1988, at A20 (noting that political action committee campaign contributions favored incumbents by a nine-to-one margin in the 1986 congressional election cycle when Congress exempted itself from certain ethical regulations).

26 See ELY, supra note 9, at 87–104 (arguing for judicial review to ensure an open political process and prevent discrimination by decisionmakers).


28 None of this is to say that anti-abortion laws cannot be subject to Type I review. A strongly libertarian Type I constitution would in all probability view anti-abortion laws as unconstitutional even if men could become pregnant. A communitarian Type I constitution, in contrast, might well mandate anti-abortion laws even if men could become pregnant.

29 Even if there were not dramatic changes in our social attitudes, such a law might actually
capacity of legislatures to protect us from such a law is the essence of Type II philosophy. But if "it just turned out" that optimal donors were exclusively or predominantly those who had recessive sickle cell anemia or recessive Tay Sacks — blacks or Jews, respectively — it would be quite a different story. The law would be singularly suspect.

Once more the issue is independent of whether a society's initial view of rights is generally libertarian or communitarian. The legislature in a communitarian society with a Type II judiciary could validly exempt all individuals from the fundamental duty to give their kidneys to the needy. But it could not do this without judicial approval if it happened that those who needed kidney transplants were predominantly or exclusively sufferers from sickle cell anemia or Tay Sacks.

Thus, this view allows legislatures to require each of us to donate our kidneys, our blood, our bone marrow, or even our chicken farms to those who need them. And it also allows our legislatures to say that we can keep some or all of these despite the alleged "rights" of those who need them. But it allows this legislative dominance only if all are burdened. If all must give up their kidneys, if all must abjure extramarital or oral sex, the issue is very different than if only some must. Nor can the question be just a matter of how such laws are written; it is also a matter of how they are applied. The be passed if there was a great emergency such as a generalized and severe failure at a nuclear plant, greater even than the Chernobyl accident in 1986. The explosion of the Chernobyl nuclear reactor released 50 tons of evaporated nuclear fuel into the atmosphere, see GRIGORI MEDVEDEV, THE TRUTH ABOUT CHERNOBYL 78 (Evelyn Rossiter trans., 1991), and ultimately contaminated over 13,000 square miles with radioactive material, see Felicity Barringer, Chernobyl Five Years Later: The Danger Persists, N.Y. Times, Apr. 14, 1991, § 6 (Magazine), at 28, 36. Suppose that, as a result of such an emergency, many people desperately needed bone marrow transplants and too few volunteer donors were available. Under such circumstances, one could imagine a law being passed requiring everyone who had suitable bone marrow to donate it to those who needed transplants.

30 Chicken farms were, in fact, at stake when President Franklin Roosevelt tried to regulate the poultry industry through the "live Poultry Code," approved under the authority of the National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195, 196–97 (1933) (amended 1935) (history of the Act at 15 U.S.C. §§ 703, 744 (1988)). In one of its last cases before it yielded to New Deal jurisprudence, the Supreme Court struck down the Act as an unconstitutional delegation of legislative power and an unconstitutional attempt to regulate intrastate commerce. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

31 See infra note 32.

32 The Georgia sodomy statute challenged in Bowers v. Hardwick, 478 U.S. 186 (1986), applied on its face to heterosexuals and homosexuals alike. See id. at 200–01 (Blackmun, J., dissenting). The Georgia law and others like it, however, were not applied, except under the most extraordinary circumstances, to heterosexual acts. See id. at 203 n.2; THE EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 5, 16 (1990); cf. Yick Wo v. Hopkins, 118 U.S. 356, 373–74 (1886) (holding that the Equal Protection Clause was violated when a municipal ordinance was selectively enforced against Chinese owners of public laundries).

The irony of Hardwick is that, to shield the statute from Type I constitutional attack, the
ultimate question must be: *in practice* do they burden all of us, or only those who do not carry weight in the legislature?

If the latter is the case, legislatures cannot be relied upon. And this is so regardless of whether or not legislators *intend* to discriminate. They may sincerely wish to save fetal or transplant recipients' lives and not mean to harm women or a disfavored group of donors. But good intentions cannot matter. If the burdened group has traditionally carried little weight in the political process, the results of that process are necessarily untrustworthy, whether or not intent to discriminate is manifest. The appropriate analogy here is Takings Clause jurisprudence. Even with a good motive (a public purpose), eminent domain takings of property are invalid unless we all bear the burden (that is, unless there is just compensation). To say in these various contexts that certain laws are suspect and that courts must step in, however, does not necessarily mean that the laws will be struck down. It means that courts cannot take the legislature's word for their necessity. Courts must do precisely what Justice Black failed to do in *Korematsu v. United States* when he deferred to the ex-Court decided first to interpret the law to apply only to homosexuals, *see Hardwick*, 478 U.S. at 188 n.2, thereby making it discriminatory on its face. Nevertheless, the Court refused to employ Type II review.

33 Perhaps the best evidence of discriminatory results without discriminatory intent can be seen in how unresponsive legislatures already *are* to underrepresented groups. In theory, of course, legislatures might be able to recognize their own limitations and declare that they are unable to protect a group. The adoption or proposal of a constitutional amendment aimed at protecting certain groups may constitute one such example of a legislative assertion of the need for extra-legislative protection. In practice, though, such events are all too rare to be relied upon for adequate relief.

34 Under traditional eminent domain jurisprudence, motive is significant only to the extent that a public purpose for the taking is required. *See Missouri Pac. Ry. v. Nebraska ex rel. Board of Transp.*, 164 U.S. 403, 417 (1896) (holding that the taking by a state of private property for private use by another violates the Due Process Clause, even if the state is willing to pay for it); *Kohl v. United States*, 91 U.S. 367, 373 (1875) (holding that the United States may exercise its right of eminent domain “to take private property for its own public uses”).

35 *See U.S. Const.* amend. V (“[N]or shall private property be taken for public use without just compensation.”); *Tribeca*, *supra* note 10, § 9-2, at 590, § 9-6, at 605–07 (arguing that the just compensation requirement for takings serves as “surrogate assurance for public purpose” and limits the “government's power to isolate particular individuals for sacrifice to the general good”). Even if the state has no discriminatory motive in exercising its powers of eminent domain, it must make sure that its citizens are willing to pay for the property with their own taxes. In that way, the burden is spread throughout society and does not fall solely on the unfortunate — and perhaps politically insignificant — landowner. Again, to use the terminology of Calabresi and Melamed, the right not to have one's property taken is given property rule protection if discriminatory motives are present, but it is given liability rule protection regardless of motive. *See Calabresi & Melamed*, *supra* note 13, at 1106–10. That compensation for takings is explicitly required by the Constitution, of course, makes this case easy. But the principle that underlies this requirement is far broader and more generally applicable to Type II analysis and the antidiscrimination Constitution.

36 *323* U.S. 214 (1944) (upholding a military commander's decision forcibly to evacuate
pertise of a military general, and what Judge Bork failed to do in *Droneburg v. Zeck* when he accepted without question the statement by the military that permitting lesbians and gays in the Navy would harm discipline. They must seriously examine whether the only way to further a *valid* (nondiscriminatory) legislative value is to burden those who are inadequately protected by elected legislators. Courts must, in other words, determine for themselves whether the legislature would have passed such a law if the burden rested on those to whom the legislators had to answer at the polls and not just on "outcasts."

Of course, if the discrimination in a particular case were genuinely intentional in the sense that the whole point of the law was to burden a powerless social group, legislatures would have no interest in "universalizing" the burden across all social groups. The law would re-

---

American citizens of Japanese ancestry to concentration camps). Forty years later, Mr. Korematsu's petition for a writ of *coram nobis* to vacate his conviction on the grounds of governmental misconduct was granted. *See Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

37 *See Korematsu*, 323 U.S. at 223–24.

38 741 F.2d 1388 (D.C. Cir. 1984) (holding that the Navy's policy of mandatory discharge for homosexual conduct does not violate any constitutional right to privacy or equal protection). *But cf.* Pruitt v. Cheney, No. 87-5914, 1991 U.S. App. LEXIS 18797, at *23 (9th Cir. Aug. 19, 1991) (sustaining an equal protection challenge and requiring the Army to demonstrate that its ban against lesbians and gay men is "rationally related to a permissible government purpose").

39 *See Droneburg*, 741 F.2d at 1398 ("The Navy is not required to produce social science data or the results of controlled experiments to prove what common sense and common experience demonstrate."). The plaintiff worked as a top-security clearance linguist and cryptographer. He had an unblemished service record and many citations for his job performance. *See id.* at 1389. Judge Bork, however, was willing to accept a broad prohibition of homosexual conduct without much further inquiry. Of course, Judge Bork's analysis differed from Justice Black's in that Judge Bork did not consider the group burdened by the regulation — homosexuals — an outcast group deserving any Type II protection. In this, I believe, he was mistaken.

40 Perhaps what the armed forces, and Judge Bork, had in mind was the fear that homosexuals might be disliked by other enlisted members and could therefore undercut the efficiency of the military. The same argument was made by the Roosevelt administration with respect to racial integration in the military and was ultimately rejected by the Truman administration. *See Exec. Order No. 9982*, 3 C.F.R. 722 (1943–1948) (creating mechanisms to integrate the armed forces). If so, the military's position is merely a different version of the generally rejected argument that an employer's discrimination can be justified if clients, co-workers, or society are also bigoted. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 16 (1958) (rejecting the argument that racial integration of public schools should be delayed simply because the prejudice of the opponents to integration might lead to violence and disorder). It is rejected, of course, because it does not reflect a valid, that is, nondiscriminatory, value.

41 There are unusual circumstances under which even racially discriminatory infringement may be deemed justifiable. *See Korematsu*, 323 U.S. at 216 ("Pressing public necessity may sometimes justify the existence of such restrictions [that curtail the civil rights of a single racial group]; racial antagonism never can."). Ironically, *Korematsu*, the case in which the strict scrutiny of racial minorities was announced, see *id.*, is one of the very few occasions in which the Supreme Court has upheld a race-specific statute disadvantaging a racial minority. *See Geoffrey R. Stone et al., Constitutional Law 572* (2d ed. 1991).
main permanently struck down. But in all other cases, the legislature may show that it really meant to further some nondiscriminatory value by seeking to universalize the burden. In such cases, imposing identical burdens may not be necessary to survive judicial scrutiny — analogous burdens will often be sufficient. Thus, in the context of eminent domain, financial compensation is enough to make a “taking” constitutional.

The same reasoning can be applied to harder cases. Take the abortion example. Compensation is not feasible, and men obviously cannot become pregnant. Still, an anti-abortion law might readily survive Type II review if the legislature also required all “expectant fathers” or all men who engaged in sex to make available their bodies — their blood, bone marrow, and perhaps even kidneys — if needed to save lives.43 Such a polity could then correctly describe itself as

---

42 Compensation is not feasible for at least two reasons. First, monetary compensation in this context may strike many as morally offensive. Although the law of torts presumes that physical injury and money (at least for lost wages, medical bills, and pain and suffering) are partly fungible, many people understandably find these presumptions inapplicable in this context. Second, paying women for avoiding abortions and carrying pregnancies to term potentially creates a perverse moral hazard. Women who become pregnant might falsely claim a “preference” for abortion in order to receive payments for later “avoiding” an abortion. And some women who would not otherwise wish to become pregnant might become so, willingly or under pressure from their partners, in order to obtain the right to compensation.

43 Apart from making men’s bodies do lifesaving work as sources of organ transplants, there are plenty of alternative forms of compulsory, lifesaving duties that could be imposed on men: building fences next to railroads, see Calvin Sims, Vandals Damage Fence Installed Along Tracks Where Child Died, N.Y. TIMES, June 5, 1991, at B4; putting up barriers in windows in ghetto housing, see Dennis Hevesi, Child Dies After She Falls from Unguarded Window, N.Y. TIMES, July 30, 1986, at B1; and performing public health and sanitation work. These requirements, and the analogous requirement that all fathers be required to give up their jobs to look after their neonates (to keep them alive) during the first few months after birth, sound outlandish only because these male burdens seem “forced,” while the requirements that a woman bear “her” fetus to parturition and take care of “her” neonate still seem for many to be “natural.” That, however, is precisely what a significant part of the abortion debate is about. Pro-choice advocates could well argue that in either case it is the law, and only the law, that creates the necessity to endure hard labor and bodily risks in lifesaving activities for the common good. Without legal intervention, a woman could freely decide whether or not to engage in (fetal) lifesaving hard labor (perhaps at the cost of her job). Similarly, under my “proposals,” a man would be compelled to engage in such activities only through legal intervention.

Even in cases such as rape pregnancies, in which it might seem that a symmetrical burden on men cannot be devised, something (albeit inadequate) can be done. It would entail subjecting all men, regardless of fatherhood expectancy or engagement in sex, to the risk of having to contribute their organs for transplants to someone they abhor. The statistical probability of being picked as a donor would be fixed at the same level as that of a woman becoming pregnant due to rape.

In the end, the “outlandishness” of my proposals is just one more bit of evidence that the polity is totally committed to life only when others have to bear the burden of preserving it, and it reinforces the intuition that we would not have anti-abortion laws if men could become pregnant.

Let me be clear. I am not saying that pro-choice laws are necessarily a good thing. I may
being pro-life but antidiscrimination. It would also be communitarian and anti-choice, and many might object to that because they would want a libertarian Type I protection to apply to bodies. But the society would be communitarian with respect to all, and not just with respect to women. As a result, to advocates of Type II jurisprudence, the question whether libertarian or communitarian values should predominate and be protected as fundamental could comfortably be left to legislatures and other "popular" bodies, rather than to the courts.44

Two questions immediately arise here. First, exactly which groups deserve protection? All laws treat some people better than others; must courts scrutinize all of them? There are some groups whom the Constitution explicitly singles out for Type I protection — for example, those whose land would be taken by eminent domain, and all religions.45 But a Type II approach would, as I have said, protect others as well — those who have a long record of social marginalization and relative powerlessness in the legislative process. But what does that mean? The classic statement in the celebrated footnote in Carolene Products46 — explaining that courts must protect "discrete and insular minorities"47 — does not adequately answer the question. Minority interests are sometimes politically very powerful.48 And at

well believe that we should be more communitarian, that our bodies, male and female, should be used for lifesaving for the common good. But although that is an issue for majoritarian bodies to decide, the issue of whether such a burden can be put only on those who have traditionally been excluded from decisionmaking power should not be ultimately decided by the majoritarian holders of such power. It is and should be, in our antidiscrimination Constitution, an issue for the courts.

44 I will return to the abortion issue in Part V.
45 See U.S. CONST. amend. V; id. amend. I. But see Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1157 (1991) (arguing that the Establishment Clause was meant to preserve the states' right to establish a religion).
46 304 U.S. 144 (1938).
47 Id. at 152 n.4; see also ELV, supra note 9, at 75–77, 148–51 (drawing on Carolene Products to support a theory of judicial review). For discussions of the impact of this footnote, see, for example, J.M. Balkin, The Footnote, 83 NW. U. L. REV. 275 (1989); and Lea Brilmayer, Carolene, Conflicts and the Fate of the "Insider-Outsider," 134 U. PA. L. REV. 1291 (1986).
48 Even before Professor Ackerman told us, we knew that Chief Justice Stone, when he wrote the Carolene footnote, had not read Professor Robert Dahl, because Dahl had not yet written. See Bruce A. Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 719 n.11 (1985). Although Dahl does not focus on Carolene Products in particular, he does argue that on some issues "discrete and insular minorities" may exercise enormous power. See ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY 125, 132 (1956). By "single-issue voting" and concentrated lobbying, well-organized minorities may even cow and dominate legislatures. The capacity of the National Rifle Association to defeat gun control legislation in the face of apparently substantial majority support is but one example. See Helen Dewar, NRA Begins Drive to Stall Crime Bill, WASH. POST, July 10, 1991, at A13 (discussing the willingness of pro-NRA Senators to use filibuster power to thwart legislation that would command a majority if voted upon).

Apart from fanatical single-issue voting, minorities in the legislatures may build coalitions and trade votes to protect their core interests and often even their second-order interests.
times, majority groups may be so diffuse and disorganized that they not only wield very little power in the legislative arena but, in fact, are consistently mistreated. Women and, in some southern states, blacks are two classic examples of diffuse majorities.49

Ultimately the inquiry must look past the political arena to society generally. It must try to identify the scapegoats in a particular society, the society's outcasts.50 Thus, homosexuals, at least as long as many remain "in the closet" out of fear of social and political rejection, clearly count as such a group, and so, given our history, must blacks, Jews, and women — even though on some legislative issues each of these groups may be very powerful indeed.51 Difficult as the issue

Occasionally a small minority may even hold the balance of power between two or more strongly divided groups or parties. In such cases, that minority may be able to make its agenda the national one well beyond the few key issues around which the minority members originally coalesced. See, e.g., Jackson Diehl, Religious Party Joins Israeli Government, WASH. POST, Nov. 17, 1990, at A16 (describing the disproportionate influence of small factions in Israeli politics).

49 Blacks in some southern states and in parts of other states certainly fit the category before the Voting Rights Act of 1965, 42 U.S.C §§ 1973 to 1973ff-6 (1988), and may fit the description still. See Chandler Davidson, Minority Vote Dilution: An Overview, in MINORITY VOTE DILUTION, 1, 12-14 (Chandler Davidson ed., 1984). There is little doubt that at the time of Roe v. Wade, 410 U.S. 133 (1973), women also fit the category. It is possible that in time, perhaps even now, women will no longer need judicial protection. Indeed, it may well be that Roe and the recent retreat from it, see infra pp. 145-49; cases cited infra note 220, are bringing about just the kind of involvement by women in the political process that would make judicial power over anti-abortion laws unnecessary and unjustified in the future. Then again it may not, for centuries of exclusion do not end easily.

50 The antidiscrimination principle gives courts their greatest power when it allows them to define the groups in need of protection. On that issue, the courts do have the last say and thus hold a power that is not simply of a "second look" sort. However, unlike the power of definition in Type I judicial review, which is based on the Court's own principles and values, the power to determine the outcasts in any given society is more objectively based and thus can be more easily limited and controlled. Courts and judges who abuse this power can be criticized in far more specific ways than courts who abuse the power to create fundamental rights. Historical data concerning which categories of people when they deal with which sorts of issues are subject to systematic exclusion is, of course, crucial and available. Indeed, the whole judicial definition of suspect classifications, although not as sophisticated as it might be, is essentially an exercise of this type of power. See infra note 52.

51 For instance, predominantly Jewish, pro-Israel lobbying groups have been extremely powerful in the United States. Still, that does not mean that Jews have not been subject to discrimination in other areas. I do not know of an analysis that adequately explains when and why some minority groups have power on some issues but are truly and secularly outsiders on others, but such an analysis would be extremely useful to the full development of a theory of representative democracy and thus to the theory of an antidiscrimination constitution.

Two observations may still be instructive. First, occasionally an outsider group cares greatly about an issue that for other reasons long-standing insiders also care about. Although the insiders may be an equally small minority, the combination can often be extremely powerful. Perhaps the pro-Israel lobby is an example of this phenomenon, as might be the success of blacks in promoting certain types of civil rights laws. But in such cases one should not assume that the outsider group has power except on the given issue.

Second, although a minority cares passionately about an issue and would even be willing to
may seem to be, it is in fact similar to, and no harder than, that regularly faced by courts in seeking to define suspect classifications.\(^5\)

The question whether the economically deprived — the poor — need Type II protection deserves special mention. Economically deprived groups have often been excluded from the political system. Unfortunately, courts are not very good at protecting the fundamental engage in single-issue voting over it, it can sometimes only engage in the political process by identifying itself in ways that are physically or economically dangerous for it. The position of homosexuals in many parts of the country and that of blacks in the South for many years are obvious examples. In earlier times, the same was probably true of the union movement. That the same group can, on other issues, wield weight without so identifying itself in no way suggests that it is exempt from discrimination.

Although, as I said, a full political science analysis of the extent and nature of the power of such groups would be very helpful, one need not wait for it. A careful historical examination, even if it does not explain why, gives a fairly solid basis for deciding which groups are not protected by the ordinary political processes and when they are not.

\(^5\) Under equal protection analysis, a statute classifying by race, national origin, or alienage is “suspect” and, therefore, subject to strict judicial scrutiny. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). The Court has addressed each of these presumptively illegitimate bases of classification. See, e.g., Graham v. Richardson, 403 U.S. 365, 374 (1971) (concluding that a state’s desire to preserve welfare benefits for its citizens does not justify restrictions on the eligibility of aliens); McLaughlin v. Florida, 379 U.S. 184, 193 (1964) (finding no essential purpose in a statute punishing the promiscuity of one racial group and not that of another); Hernandez v. Texas, 347 U.S. 475, 482 (1954) (holding that systematic exclusion of persons of Mexican descent from juries deprived members of that class of equal protection). But see Hampton v. Mow Sun Wong, 426 U.S. 88, 102–03 (1976) (applying only “some degree” of scrutiny to invalidate under the Due Process Clause a federal regulation barring noncitizens from civil service employment).

A statute classifying by gender or on the basis of illegitimacy, however, is currently subject to an intermediate level of judicial scrutiny. See Cleburne, 473 U.S. at 440–41. In Frontiero v. Richardson, 411 U.S. 677 (1973), the Supreme Court recognized that women have been severely discriminated against and concluded that classification by gender is subject to strict scrutiny. See id. at 688. The Court then retreated and classified women as a semi-suspect class in Craig v. Boren, 429 U.S. 190 (1976), as it applied only a somewhat heightened standard of review to invalidate an Oklahoma statutory scheme prohibiting the sale of “nonintoxicating” beer to males under 21 and females under 18. See id. at 191–92. For a case addressing the level of scrutiny applied to classifications made on the basis of illegitimacy, see Mills v. Hlubietzel, 456 U.S. 91 (1982). There the Court found that a one-year statute of limitations on paternity suits to determine the natural father for purposes of child support denied equal protection to illegitimate children. See id. at 98–100.

All in all, the strict scrutiny categories are woefully rigid and incomplete. When they apply, invalidation of the government action is virtually certain. But there are instances in which genuine judicial intervention is appropriate without thereby predetermining the result. For a particularly interesting example of a court’s willingness to intervene without deciding the underlying issue without more data, see Pruitt v. Cheney, No. 87-5914, 1991 U.S. App. LEXIS 18797 (9th Cir. Aug. 19, 1991). In this case, the court required the Army to demonstrate that its ban against lesbians and gay men is “rationally related to a permissible government purpose.” Id. at *23.

Apart from groups qualifying for Fourteenth Amendment strict and other scrutiny, there are various other groups to whom specific clauses in the Constitution grant Type II protection. See infra p. 114.
rights of poor people from discriminatory undermining. I discuss why this is so, and its consequences, later in my discussion of England. Suffice it to say now that possible legislative bias alone is not enough to justify vigorous Type II jurisprudence. Type II review will only work when judges have less bias than the legislature — and that is unlikely when economics defines the underrepresented group.

Once courts have determined that a group needs Type II protection, they must face a second and equally knotty question. What kinds of selective treatment are sufficiently significant to support judicial intervention? I have already mentioned that the selective treatment need not be specified by a statute on its face; it may also be manifested in the law's application. Nor does such treatment need to be genuinely intentional. Still, these considerations do not indicate when such treatment is sufficiently significant in substance. The answer seems to be that the antidiscrimination principle is always presumptively violated when the legislation works to impose a significant practical disadvantage or burden on the group, such as the denial of access to the courts or to a quality education. But it is also at risk when, although the tangible burden is slight or nonexistent, the selective legislation reinforces the very sort of discriminatory attitudes and treatment that earned the group its disfavored status in the first place. Thus, for some kinds of groups, historically excluded racial groups are a prime example, almost any selective treatment — even selective treatment with respect to things like running laundries or access to toilets, that, apart from the history of discrimination, would have little practical significance — is sufficient to justify judicial intervention. For others, such as women and religious groups, the issue is more complex.

The foregoing concerns immediately raise the issue of favorable selective legislation. If the legislation is genuinely and distinctly favorable, such as certain affirmative action programs, Type II is considerably more accommodating. I should emphasize here that the principle in a Type II approach is antidiscrimination, not equal pro-
tection. The issue is one not of equality, but of when the people put burdens on themselves, on those who by and large can protect their fundamental interests through the legislative process, and when, instead, the people put burdens on those whose fundamental interests the legislature can readily ignore. As a result, Type II judicial review does not have any difficulty, in principle, with affirmative action or even with so-called reverse discrimination.\footnote{Thus, the antidiscrimination principle has no theoretical problem with the Court's most recent affirmative action decision — and Justice Brennan's last — in 
Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990). There the Court upheld the use of racial preferences by the federal government in the awarding of television broadcast licenses. \textit{See id.} at 3010–16. In \textit{Metro Broadcasting} and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), the Court suggested that furthering the value of diversity itself could justify affirmative action. \textit{See Metro Broadcasting,} 110 S. Ct. at 3010 (holding that "the interest in enhancing broadcast diversity is . . . an important government objective and is therefore a sufficient basis for the Commission's minority ownership policies"); \textit{Bakke,} 438 U.S. at 311–12 (opinion of Powell, J.) (declaring that attaining a diverse student body "clearly is a constitutionally permissible goal"). In \textit{City of Richmond v. J.A. Croson Co.,} 488 U.S. 469 (1989), however, the Court held that affirmative action programs could be justified only as efforts to remedy identified past discrimination. \textit{See id.} at 505–06. The two theories have generated significant comment. \textit{See, e.g.,} Charles Fried, \textit{The Supreme Court 1989 Term — Comment: Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality,} 104 \textit{Harv. L. Rev.} 107, 110–13 (1990). The distinction, however, is irrelevant to some aspects of Type II jurisprudence. As long as a majority has decided to burden only itself through an affirmative action program and its action does not in fact burden others, it has not offended the antidiscrimination principle.}

Sometimes, however, seemingly "favorable" legislation nevertheless raises antidiscrimination issues because of its severe stigma-reinforcing effect: legislation to "protect" women, by excluding them from the draft or from combat duty, is a prime example.\footnote{Because very few people like being drafted, the practical burdens here clearly fall on men. Yet the burden on women in terms of stereotype reinforcement seemed a great one to the plaintiffs in cases such as \textit{Rostker. See Rostker,} 453 U.S. at 94–95 (Brennan, J., dissenting) (citing Orr v. Orr, 440 U.S. 268 (1979)); cf. Michael K. Frisby, \textit{Senate Votes to Lift Ban on Women War Pilots,} \textit{Boston Globe,} Aug. 1, 1991, at 1 (noting that new opportunities will allow women pilots to prove themselves). At times the issue is even more complex. Some self-described beneficiaries of clearly favorable affirmative action programs continue to support such programs but argue nonetheless that the programs are laden with costs to the very groups they are designed to protect. For a particularly subtle and powerful discussion of this difficult issue, see \textit{Stephen Carter, Reflections of an Affirmative Action Baby} 59–69 (1991).} At other times, what passes for affirmative action is the result of a coalition of powerful minorities who combine to create new losers,\footnote{Perhaps this is what the Court had in mind in the recent Richmond, Virginia, "set-asides" case. \textit{See City of Richmond v. J.A. Croson Co.,} 488 U.S. 469, 505 (1989) (overturning minority set-aside statute as not necessary to achieve a "compelling [governmental] interest"). The ordinance required those who obtained construction contracts from the city to subcontract at least 30% of the contract's dollar value to "Minority Business Enterprises" (MBEs). \textit{See id.} at 477. MBEs were defined as those businesses at least 51% owned by "minority group members," including Blacks, Hispanics, Orientals, Indians, Eskimos, and Aleuts. \textit{See id.} at 478. Justice O'Connor's opinion for the first time applied strict scrutiny to a law that (ostensibly) discriminated against whites. \textit{See id.} at 493–94. At the time the set-aside ordinance was adopted, only} or to discriminate
against old losers in a new context. At still other times, it constitutes a genuine attempt to benefit an outcast group, but only by placing the burden on another group of traditional losers rather than on "all of us." Interestingly, in some contexts, the danger of discrimination is deemed symmetrical. Thus, the selection of one group to be benefitted — a particular religion, for example — itself automatically defines and injures another group in need of Type II protection — all other religions. In other contexts, laws favoring particular

0.67% of the city's construction contracts had been awarded to minority businesses in the preceding five years. See id. at 479–80. Richmond, however, was 50% black, and the City Council that passed the ordinance was more than half black. See id. at 495. It is possible that Justice O'Connor was persuaded (wrongly, I think) that whites were actually a discriminated-against minority group in Richmond's political process.

It is hard to deny that, in some instances, affirmative action could be a cover for discrimination, new or old. See, e.g., Julie Johnson, Wider Door at Top Colleges Sought by Asian-Americans, N.Y. TIMES, Sept. 9, 1989, at 1 (discussing charges that policies aimed at achieving a "delicate balance" within the student body at elite universities work disproportionately against Asian-Americans). Again, whether a particular affirmative action program discriminates against some traditional losers who still need protection is a hard, empirical question that courts must face. The need to bar such discrimination does not justify, in principle, a universal prohibition on the majority putting burdens on itself for the benefit of previously mistreated outsiders. Cf. Metro Broadcasting, 111 S. Ct. at 3025–26 (holding that FCC minority ownership policies do not impose impermissible burdens on nonminorities); Bakke, 438 U.S. at 311–15 (opinion of Powell, J.) (striking down racial quotas for admission to University of California medical schools and arguing that, although racial distinctions between students must be subjected to strict scrutiny, such distinctions may sometimes stand when they are used to achieve the educational benefits that accrue from an "ethnically diverse" student body).

One could see the entire abortion debate in these terms. One could say that anti-abortion laws favor fetuses, but only at the expense of a traditionally powerless group in society, women. Conversely, pro-life advocates argue that Roe v. Wade favors women, but only at the expense of an even less protected group, fetuses. As I point out, neither side seems inclined to demand that men bear analogous burdens. See supra note 43; infra pp. 145–48.

In the United States, no religion is so dominant that it can be viewed as exempt from discrimination, that is, as a majority group that can constitutionally take such a burden on itself. That is the success story of the Establishment Clause, whatever its original intent with respect to the protection of state religious establishments may have been. See Amar, supra note 45, at 1157–62 (arguing that the Fourteenth Amendment might best be read not to incorporate establishment principles against the states). For a general discussion of the Establishment Clause, see Tribe, supra note 10, §§ 14-2 to 14-3, at 1155–66. Taken together with the fact that all religions have historically been the subject of violent hatred from other religions, this may explain the apparent "symmetry" in religion cases and the absence of affirmative action and reverse discrimination arguments in this area.

But this does not mean that a form of affirmative action has not existed in this area. Indeed, the historical dominance of religious feeling in the United States may help explain the validity of rules designed to protect the non-religious, even when such rules, in practice, burdened religion and the religious. See, e.g., Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (applying to challenged governmental acts criteria requiring a secular purpose, a primarily secular effect, and an absence of excessive entanglement of government in religious activities); see also Edwards v. Aguillard, 482 U.S. 578, 593–94 (1987) (invalidating a Louisiana law forbidding the teaching of the theory of evolution without instruction in "creation science"); School Dist. v. Ball, 473 U.S. 373, 397–98 (1985) (invalidating a state-funded education program because it had the
groups — such as the poor or the handicapped — do no such thing.  

Thus, although there is no problem in principle with affirmative action under Type II jurisprudence, the question whether a particular affirmative action or reverse discrimination plan violates the antidiscrimination principle often raises immensely complex empirical questions. Type II advocates recognize the difficulties but insist that courts are best suited to resolve them. Legislatures cannot deal with them adequately, precisely because discrimination against "outsiders" is involved.  

"primary or principal" effect of advancing religion). Such rules could be viewed as examples of the dominant majority accepting burdens on itself for the benefit of outcasts.

One can even conjecture that the discomfort the Court currently feels concerning some of these rules may stem from an unarticulated and barely conscious view that now the "insiders" are no longer the "faithful," but may instead also be the "secularists." Greater tolerance of government "entanglement" in religious activities has been hinted at recently. See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 621 (1989) (holding that a Nativity scene on the staircase of a county courthouse is impermissible, but that a menorah next to a Christmas tree outside a city building is permissible). Ironically, the current call for "affirmance of" or at least "nondiscrimination against" religious values may be justified not by the predominance of religious feelings in American society, but rather by the decline in such feelings. This decline may mean that we cannot now, without judicial consideration, accept rules that once were perfectly acceptable and constitutionally justified forms of reverse discrimination.

I do not mean, here, to argue that the facts today justify such a change, but only to suggest that judicial discomfort may not be as mindlessly populist-majoritarian as it is often described.

To my knowledge, no law favoring the handicapped has been successfully challenged as an unconstitutional discrimination against the non-handicapped. And very recently Justice Scalia, an ardent opponent of racial affirmative action, was quoted as favoring affirmative action programs for the poor. See Steven A. Holmes, Mulling the Idea of Affirmative Action for Poor Whites, N.Y. TIMES, Aug. 18, 1991, § 4, at 3.

Because this theoretical defense of affirmative action may seem way out of line with the current thinking of the Supreme Court, it may be well to point out that the seeming paladins of anti-affirmative action on the Court are far from consistent on this issue. Thus, in Califano v. Goldfarb, 430 U.S. 199 (1977), Justice Rehnquist dissented and, joined by Chief Justice Burger and Justices Stewart and Blackmun, argued that a law, which would be suspect and probably invalid if it discriminated against women, was valid because it discriminated against men. See id. at 235-42 (Rehnquist, J., dissenting). Surely this is a reverse discrimination position. Justice Brennan, joined by Justices White, Marshall, and Powell, also took a reverse discrimination position. He argued that the law discriminated against women rather than men and hence was invalid. See Califano, 430 U.S. at 204-17. The telling vote was Justice Stevens, who found that even though the statute discriminated against men rather than women, it was invalid on other grounds. See id. at 217-24 (Stevens, J., concurring). Nor is this the only case suggesting that the Court would uphold legislation "favoring" women. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 82-83 (1981) (upholding draft registration legislation that exempted women); Michael M. v. Superior Ct., 450 U.S. 464, 476 (1981) (upholding a statutory rape law that criminalized sexual relations only with female minors). Thus, despite its language, the Court does not appear to have reached a principled rejection of the concept of reverse discrimination. Rather, the Court's anti-affirmative action stance appears to be directed only against some specific categories of reverse discrimination that the Court dislikes. The Court's position may reflect intuitive and half-articulated empirical assumptions about the discriminatory effect...
In the end, both the question of affirmative action and the question of which selective treatments are sufficiently significant to support judicial intervention turn on the empirical question of what in the particular context constitutes discrimination. The antidiscrimination approach is based on the notion that legislatures should be required to minimize the discriminatory effects of laws that gained support when they primarily burdened societal outcasts. Legislatures would be made to choose whether the values such laws furthered were important enough to warrant burdening the society as a whole and not just its "little ones." The antidiscrimination principle itself, however, has deeper roots. It depends on the idea that to be free from discrimination is a fundamental right, at least as important and as firmly embedded in the structure of our Constitution as the separation of powers, federalism, and the concept of enumerated rights itself, and that as a fundamental right it deserves equally absolute protection. It would not be incorrect, then, to regard Type II review in effect as Type I protection of the fundamental right of outcast groups to be free from discrimination.

C. Type III: Judicial Enforcement of Constitutional Accountability

Type III judicial power could appropriately be called the "Bickellian" approach after the late Professor Alexander Bickel of Yale Law School. Bickel did not, of course, believe in courts having only this function. In fact, he supported giving courts limited Type I and very substantial Type II powers. Still, his great works are the ones that identified the Type III function.

Type III review, unlike Type II review, is triggered by a variety of dubious legislative actions. Legislatures often act hastily or

of these forms of reverse discrimination. The assumptions may be correct or may be misguided, but they certainly do not constitute a thoughtful and thorough consideration of the question.

66 The interdependence between a group's history and what constitutes discrimination, see supra p. 99, which was pointed out to me by the late Professor Albert Sacks of Harvard Law School, in no way undermines the need for judicial oversight. Indeed, it highlights the need for such oversight to protect outcasts from discriminatory violation of fundamental rights not spelled out in the founding document. If the very definition of fundamental rights is linked to the history of discrimination against a particular group, it is essential that a non-majoritarian body, such as a court, define both the rights and the group.

67 I will return to these "deeper roots" in Part IV.

thoughtlessly with respect to fundamental rights because of panic or crises or because, more often, they are simply pressed for time. At other times, they hide infringements of rights through vague language or give no thought to the reach of the language they have used. At still other times, they delegate to bureaucrats who are not accountable to the people and who therefore cannot be trusted with the protection of rights. Legislatures also often shirk responsibility by failing to repeal old laws that have come — either through growth in rights or through change in the effect of the old laws — to violate entitlements that would be deemed fundamental if the issue were truly addressed today. All the above cases are instances of a breakdown of accountability that affects fundamental rights, and thus could be called failures of "constitutional accountability." The two most general categories of such breakdown are "haste or thoughtlessness" and "hiding."

The Bickellian approach to judicial review is based on the notion that, even if majoritarian legislatures are generally more trustworthy and less dangerous than courts as the definers and bulwarks of fundamental rights, when there is haste or hiding we cannot rely only on legislators to protect such rights. When there is hiding, neither the people nor their representatives are genuinely speaking; when there is haste, they may be speaking, but without the attention required for the protection of rights.

As a result, Type III jurisprudence requires that when the legislature has acted with haste or hiding in a way that arguably infringes even upon the penumbra of fundamental rights, courts should invalidate the possibly offending law and force the legislature to take a "second look" with the eyes of the people on it. According to this conception, judges do have to offer provisional definitions of fundamental rights — otherwise judges cannot know when legislative haste or hiding implicate rights. At the same time, such provisional def-

---

69 Bickel, supra note 6, at 22–29.

70 See, e.g., Bickel & Wellington, supra note 68, at 34–35 (arguing that the proper judicial response to a broad delegation of power was to remand the case to Congress because the delegation infringed on the penumbra of fundamental structural rights). It may often seem that most laws are ultimately the result of either haste or hiding, because the democratic structures instituted to avoid one often encourage the other. For instance, the requirements for a bill to become law — bicameral passage and presidential presentment, to name only the constitutional requirements — seek to ensure that bills are not too hastily passed into law. Yet these same requirements also make the government less responsive, allowing if not encouraging hiding. See infra notes 86, 139 and accompanying text. The rejoinder is that, as long as fundamental rights are implicated, it is irrelevant that to avoid haste and hiding government is forced to walk a very fine line. Indeed, that is just the point of Type III review. The more seriously such rights are implicated, the finer the line that Type III review forces legislatures to walk.

71 Critics may assert that Type III review gives judges just as much power as Type I review in creating such provisional rights, but simply with slightly less power to enforce them. On the contrary, Type III review plainly leaves the last word with the democratically elected legislature.
Definitions can be countered by legislatures if they reenact the controversial provision openly. In such cases, the legislative counter is valid only for a limited time. At a certain point—if the law continues to implicate possible fundamental rights—new politicians in a new set of circumstances, and with a new set of people looking at them, must reaffirm the possibly offending law. Once again, the approach applies whether society is generally libertarian or communitarian. In a communitarian state, a bureaucrat's decision permitting individuals to refuse their kidneys for transplant to the needy would be as subject to judicial invalidation, pending a legislative determination, as would a bureaucrat's decision requiring kidney donations in our relatively libertarian polity.

One example of the legislature having the last word can be seen in Furman v. Georgia, 408 U.S. 238 (1972), and in Gregg v. Georgia, 428 U.S. 153 (1976). After the Supreme Court struck down Georgia's capital sentencing procedures in Furman, see 408 U.S. at 239-40, Georgia modified its death penalty statutes to comply with the Court's requirements. In Gregg, the Court upheld Georgia's revised procedures for imposing capital sentences and pointed out that the "standards of decency" rationale used in Furman for invalidating the death penalty, see 408 U.S. at 257, had been undermined by the pro-death penalty measures adopted by 35 state legislatures in the wake of the Furman decision. See Gregg, 428 U.S. at 179-80.

When he first described such a scheme of judicial review, Bickel was criticized for providing too narrow and conservative a role for the judiciary. The criticism was that judges who could use Type III remands would hesitate to employ Type I nullifications in the hope that the legislature would fail to reenact the offending law and the issue would disappear. If, instead, the legislatures repassed the law, the same judge who, absent Type III review, would have initially struck down the law once and for all might now hesitate to use Type I powers in the face of so clear and powerful a reaffirmation of the legislature's desire to violate the alleged right. In essence, the two criticisms are analogous and demonstrate the utility of Type III review. The first fears its use because it may encourage courts that would otherwise give no protection to such rights to give provisional protection to them, pending legislative reconsideration. The second fears that judges who would otherwise give ultimate protection to these rights may end up not doing so after legislative reconsideration and reaction. In other words, Type III would restrain those courts that are overly inclined to enforce newly minted rights, and would encourage some defense of such rights by those courts that tend to give them little weight. And that is precisely its value. For these reasons, I would expect Type III jurisprudence to be criticized by rights activists during the tenure of Warren-like courts and by rights skeptics during the tenure of Rehnquist-like ones.

72 Sometimes, as provided by the California Constitution, the second-look remand occurs through referenda and ballot initiatives addressed to the public. In California, amendments to the state constitution are relatively easily achieved through citizen-initiated referenda. See CAL. CONST. art. II, §§ 8–11. As a result, a holding of unconstitutionality by the California Supreme Court may have no greater effect than a remand for a second look. The remand is simply to the public rather than to the legislature. Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 10–12 (1982) (discussing the California Constitution).

73 Canada requires such a reexamination every five years. See infra note 143. American courts could develop an equivalent arbitrary time period. They might instead, and preferably, look to developments in other jurisdictions, or in related areas of law in their own jurisdictions, for specific indications that the previous popular determination is outdated and could no longer be relied on. Cf. CALABRESI, supra note 72, at 129-41 (delineating the factors that can justify the use of judicial power to force reconsideration of an old statute).
It is instructive to distinguish here between a Type III approach to judicial review and the very different view sometimes attributed to me in my book, *A Common Law for the Age of Statutes*:

74 **CALABRESI, supra note 72.**

75 In *A Common Law for the Age of Statutes*, I raise the question whether inertial force should be given to rules that fit well in the legal topography generally (a topography made up of both statutes and common law rules), or to specific statutes that do not fit this topography and that have certain attributes such as obsolescence or haste that make them suspect. I note that one possible way of giving inertial force to rules that fit the landscape as a whole would be to permit courts to send such “out-of-phase” statutes back to the legislature for a second look. Although I suggest that under some circumstances such a remand may be justified, I also propose many other less dramatic approaches and techniques for dealing with the issue. See *id.* at 81–119 (discussing judicial sunsetting of obsolete statutes); *id* at 146–62 (discussing other less dramatic judicial techniques).

76 The idea that haste and hiding by legislatures are impermissible only if the result impinges upon a fundamental right is implicit in Bickel’s argument. See, e.g., **BICKEL, supra note 6, at 165** (arguing that the Court invoked the delegation doctrine in Kent v. Dulles, 357 U.S. 116 (1958), only because the right to travel is so “jealously regarded”).

77 One could, of course, have a definition of fundamental rights that conflates the two approaches. *Cf.* Ives v. South Buffalo Ry., 94 N.E. 431, 439–42 (N.Y. 1911) (noting that the shift from fault to strict liability embodied in worker’s compensation laws implicates the fundamental, constitutional right of due process because it derogates from the common law of tort), overruled by Montgomery v. Daniels, 340 N.E.2d 444 (N.Y. 1975). Thus, someone could say that all people have a fundamental right to be treated in a way consistent with the legal landscape as a whole, that is, in a way consistent with the common law generally. Although some deviations from the legal landscape are commonly viewed as so egregious as to violate something fundamental, many other deviations would not be considered to justify rights-violation treatment. This may be reflected in the old maxim that “no one has a vested interest in the common law.”

78 See **ACKERMAN, supra note 6, at 6–7, 44–57.**
the framework (defined the rights) that should govern the ordinary politics of their representatives for years to come. The structure and rights so defined are to be enforced by courts (among others) against those who in an everyday political way would undercut them.

To Ackerman, then, our polity is dualist. It contemplates rare, charismatic, constitutive moments — the Founding, post-Civil War Reconstruction, and the New Deal — when “The People” speak. In my terminology, it is at such constitutive times that “We The People” define the extent of Type I protections desired and adopt or reaffirm the Type II antidiscrimination principle.

To Bickel and adherents of the Type III approach, however, the world is not so binary. Between the great constitutive moments when the Constitution is reframed, there are crucial intermediate moments. At such times “The People” may not be sufficiently awake or engaged to reframe the whole system, but they may still be roused enough to be the best decisionmakers — better than courts or everyday legislatures — for determining whether or not a potential individual infringement of rights is serious.

Type III jurisprudence seeks to use both courts and legislatures to create such “mini-constitutional moments.” It seeks to raise an issue that involves putative fundamental rights above the level of ordinary politics by having courts impose on legislatures the requirement of an open and thoughtful second look, with “The People’s” eyes upon them. It seeks to prompt a careful consideration of fundamental rights without demanding the kind of all-out engagement of “The People” that Ackerman’s great moments contemplate. Indeed, it is not absurd to suppose that in their constitutive moments, “The People” might opt to (re)authorize not only Type I and Type II protections, but also Type III supervision as well. Bickellian jurisprudence maintains that when putative fundamental rights are in play, the right to open and thoughtful consideration by representatives or by the people is as deserving of Type I protection as are other such fundamental notions

79 See id. at 6–7.
80 See id. at 185–95, 263–65. Bruce Ackerman’s theory of constitutional moments could be interpreted as a synthesis of the positivist, law-enforcement conception of judicial review and the rights-based conception. Each constitutional moment, in a sense, gives renewed legal effect to the conceptions of fundamental rights that moment made part of the Constitution.
81 See id. at 40–41.
82 At the beginning of his book, Ackerman seems strictly dualist between ordinary politics and constitutional moments. See id. at 32 (“America is a dualist democracy.” (emphasis in original)). Toward the middle, however, he seems to leave room for governmental actions that fit somewhere in between as he asserts that the adoption of the Twenty-Sixth Amendment, which lowered the voting age to 18, “did not serve as the organizing focus of the turbulent constitutional politics of the late 1960’s,” but was merely a “super-statute” that overrode the Supreme Court’s invalidation of a previous congressional attempt to lower the voting age. Id. at 91.
as separation of powers, federalism, enumerated rights, and of course, the antidiscrimination principle.

D. Type IV: Judicial Deference to the Majority

Type IV jurisprudence maintains that fundamental rights should be defined by the people or their representatives. Even if rights are initially proposed by philosophers, judges, and scholars, their best protection lies in the ordinary political processes. The violation of antidiscrimination principles and the breakdown of constitutional accountability represent pathologies of the legislative process, even evils. The cure of handing over the power to enforce rights to untrustworthy courts, however, would be worse. Type IV proponents argue that judicial power too often leads to the erosion of some people's fundamental rights in the name of the rights of others to whom courts feel especially tied.

For example, in a communitarian society it would be feared that despite a clear legislative exemption from the general collectivist rule, kidney transplants would be deemed constitutionally mandated by courts, because many of those who needed kidneys belonged to the same class as the bulk of the judiciary. Conversely, in our more libertarian society, the fear would be that the judicial abrogation of a law requiring kidney transplants would be based on the particular vision of the judges whose class by and large had good kidneys.

Strictly speaking one can take the "majoritarian" position on two grounds. The more intuitive ground — and the one presumed in the text — is that fundamental rights exist independently of the political process, but that it is too dangerous to entrust their definition and protection to anyone but executives and legislatures. Some role for courts still remains. Thus the courts' statements that an action violates rights might, like the Declaration of Independence's or Magna Carta's statements of rights, have a hortatory or political effect.

The second ground is more positivist. It defines rights in terms of what a legislature has done. Unless such bodies treat certain things as rights and protect them, they are not rights at all. And this is so regardless of whether possible discrimination is involved or whether the relevant bodies acted openly or not. Obviously, this approach leads to the exclusion of judicial review; indeed, it implicitly denies the existence of fundamental rights altogether. See William H. Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693, 703-05 (1976). It should go without saying that this Foreword rejects such a skeptical view of rights.

Although the two majoritarian positions are technically quite distinct, in practice proponents of the majoritarian constitution often skip back and forth between them and assert that rights are what legislatures say they are, and even if they were not, the protection of rights by anyone else is far too dangerous to be countenanced.

The most common fear expressed is that courts will represent elitist values rather than those of the people at large. See, e.g., Simon Lee, Bicentennial Bork, Tercentennial Spycatcher: Do the British Need a Bill of Rights?, 49 U. Pitt. L. Rev. 777, 785 (1988) (commenting on the British distrust of the judiciary given the justices' elitist backgrounds); cf. Learned Hand, The Bill of Rights 73 (1958) ("[I]t would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not.").

This scenario is, of course, analogous to the fear of what the "Old Court" did to New Deal statutes concerning property rights.
Rather than risking such evils, Type IV adherents would argue, one should seek to limit the dangers of discrimination and of haste and hiding by improving the legislatures themselves. Voting rights acts to ensure greater participation, structural reforms to guarantee open law-making, and perhaps even fewer checks and balances\textsuperscript{86} are the ways to create responsible, responsive legislatures. Reliance on courts will ultimately lead only to still more abdication of responsibility. Finally, some proponents of Type IV review lament the potential of judicial review to undermine the people’s self-participatory democratic sensibilities.\textsuperscript{87}

### III. A Look at Three Countries’ Approaches to Judicial Review

#### A. The American Approach

The irony of today’s great American debate between former Judge Robert Bork and other recent judicial appointees on one side, and Justice William Brennan and much of the academic constitutional law establishment on the other, is that both sides share the same approach to judicial review. They are both, to a perverse and startling degree, Type I fundamentalists.

But here the two groups part company. Robert Bork and his fellow travellers understandably fear abuse of judicial power if courts grant constitutional protection to every value philosophers and judges believe to be fundamental. As a result, they retreat into a narrow originalism that is impossible in theory and produces outrageous results in practice.\textsuperscript{88} Justice Brennan and others, seeing the foolish

\textsuperscript{86} One must remember that although reducing checks and balances may decrease the likelihood of legislative hiding, it may increase the likelihood of haste. \textit{See infra} note 139. Nor is this an academic concern: the laborious, time-consuming requirements for the passage of a bill into law — a classic instance of checks and balances — did in fact help arrest the frenzy to pass a federal anti-flag burning law in 1990. Thus, a structural feature of the political processes preempted the need for Type III review. \textit{Cf.} Joel Chineson, \textit{A Skeptic’s View of the Government at Work}, \textit{The Recorder}, June 27, 1991, at 5 (book review) (pointing out that the national frenzy over flag burning dissipated quickly and stating that “I can’t even remember what my own opinion was on the flag issue, though I remember I had a strong one”).

\textsuperscript{87} \textit{See} JAMES B. THAYER, \textsc{John Marshall} 107 (1901) (“The tendency of a common and easy resort to this great function ... is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”). This lamentation could also be phrased in terms of rights: every act of judicial intervention, according to this view, violates the people’s right to self-participatory democracy. But, like John Ely and Alexander Bickel, I would maintain that, without some Type I safeguards — for example, free speech — and many Type II and Type III protections, judicial deference to legislators does not ensure democratic self-participatory decisionmaking at all, and hence fails its own test.

\textsuperscript{88} \textit{See supra} notes 5 & 16.
results of the Bork position, cheerfully find and enforce rights wherever and whenever they desire. Each side points gleefully to the absurdity or extraordinary dangers of the other side's approach, and Justices Black and Stewart — not to mention Professor Alexander Bickel — spin in their graves.

Unfortunately, the popular and scholarly attention heaped upon this debate has obscured the fact that the United States Constitution has not been — at least since the New Deal — limited, or even primarily devoted, to Type I judicial review. The New Deal heralded a substantial change in the attitude of the Court toward the definition of fundamental rights. It was, in Ackerman's terms, a paradigmatic "constitutional moment" in which the unitary libertarian conception of fundamental rights that had been in the ascendancy since the late nineteenth century was decisively rejected. The New Deal did not, however, create a polity in which an equally dominant communitarian view of rights was adopted. It created instead a hybrid, although one with decidedly more libertarian than communitarian leanings.

In polities in which either a virtually pure libertarian or communitarian notion of rights is accepted, it is much easier to vest broad Type I powers in the courts. Courts are less in need of notions of "enumerated rights" or "original intent" to hem them in. They and their potential critics know instinctively, because it pervades the whole system, what government ought and ought not to do, what seems "natural" and "unnatural." As a result, the dangers of judicial abuse are limited, even if courts use vague clauses and loose constitutional language to support Type I decisions.

The danger of judicial abuse multiplies when absolutes are abandoned and libertarian and communitarian rights are mixed. Judges applying Type I judicial review under loose and undefined language are more likely to be enforcing only their own views rather than the polity's notions of what the government should and should not do. Such is the predicament that America finds itself in today. Little wonder then that, to many, legislatures have come to seem less dangerous than the elitism of courts and scholars.

I would contrast our experience not only with that of Canada and England, but also with that of some countries that have recently been dominated by dictators. In these lands, "the government," "the political processes," have too openly and clamorously let down all the

---

89 See, e.g., Ackerman, supra note 6, at 41 (arguing that the New Deal was one of three "decisive moments" in which deep changes in popular opinion gained "authoritative constitutional recognition"); Ackerman, supra note 20, at 511-15 (arguing that the New Deal Court's "switch in time" inaugurated a period in which the Court ratified the practical equivalent of constitutional amendments that had been enacted as laws by political branches legitimized by decisive electoral mandates).

90 I discuss these two nations' experiences below. See infra pp. 124-31.
people, not just the outcasts, and in reaction relatively unadulterated
Type I constitutions have been adopted. Judicially enforced funda-
mental rights are paramount. In such countries, both libertarian and
communal rights are enumerated, often in great detail. And even the
possibility of constitutional amendments abrogating them is, not sur-
prisingly, suspect.91

One should also contrast the United States and these countries
with another kind of Type I country. There are lands, such as Iran
or the pre-Glasnost U.S.S.R., in which a view of what is proper for
government to do prevails apart from the will of the people and in
which some set of religious or political-philosophical values that can-
not be abrogated by the majority is deemed essential. Even though
these values are enforced against the state by “the Imam” or “the
party” rather than by the courts, the approach is essentially Type I.
Guardians are chosen because they are thought to be most able to
discern and enforce the higher values, and no amendment or awak-

91 Italy and Germany are obvious examples. When Italy’s Constitution was created in 1949,
“every precaution was taken to provide for effective constitutional safeguards. Among the most
interesting innovations [was] the provision for a Constitutional Court ....” 8 CONSTITUTIONS
[hereinafter CONSTITUTIONS OF THE WORLD]; see also COSTITUZIONE [Constitution] [COST.
arts. 134-137 (Italy) (establishing a constitutional court), translated in 8 CONSTITUTIONS
OF THE WORLD, supra, at 81-83. In addition to many traditional libertarian rights, such as rights to
assemble, to religious worship, and to free expression, see id. arts. 17, 19, 21, translated in 8
CONSTITUTIONS OF THE WORLD, supra, at 51-52, the Italian Constitution also guarantees
numerous “social rights,” including rights to work, to health care, to an education, and to
disability benefits, see id. arts. 4, 32, 34, 38, translated in 8 CONSTITUTIONS OF THE WORLD,
supra, at 48, 54, 55, 56. It also declares that “[t]he Republican structure is not subject to
constitutional amendment.” Id. art. 139, translated in 8 CONSTITUTIONS OF THE WORLD,
supra, at 83.

The German Basic Law also enumerates fundamental human rights that cannot constitu-
tionally be amended. See GRUNDGESETZ [Constitution] [GG] art. 79, § 3, translated in 6
CONSTITUTIONS OF THE WORLD, supra, at 116 (making amendments of the basic principles laid
down in Articles 1 and 20 inadmissible). See generally infra note 94 (discussing the repealability
of the First Amendment of the U.S. Constitution). Among these unrepeatable rights is “the
right to resist any person or persons seeking to abolish [the] constitutional order, should no other
remedy be possible.” GG art. 20, § 4, translated in 6 CONSTITUTIONS OF THE WORLD, supra,
at 90. The German Basic Law, like the Italian Constitution, creates a Constitutional Court to
protect these “basic rights.” See id. art. 93, translated in 6 CONSTITUTIONS OF THE WORLD,
supra, at 127.

These protections place fundamental rights outside the range of ordinary lawmaking and
majoritarian pressures because majoritarian pressures have in the past led to violations of such
rights. See generally MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD
25-28 (1971) (discussing the functional origins of judicial review in the United States and other
polities).

The U.S. Constitution contained only two explicit limitations on the power of amendment.
It forbade amendments concerning the slave trade before 1808 and protected every state from
being stripped of an equal number of senators. See U.S. CONST. art. V. I discuss the amend-
ability of the U.S. Constitution above. See supra note 6.
ening by "The People," nor any ordinary political legislative action, is supposed to alter that structure.92

None of this is to say that America has not had and does not continue to have a strong Type I tradition. The lengthy discussion of the many Type I adherents and their varying approaches suggests the influence of Type I jurisprudence in American history,93 and so does the existence of several areas of constitutional case law that have consistently attracted Type I protection. First Amendment cases are the paradigm,94 although there are others, and they are by no means

92 The 1980 Constitution of Iran, for example, explicitly requires legislation to be vetted by a self-perpetuating group of "protectors of the faith." Article 4 declares:

All civil, penal, financial, economic, administrative, cultural, military, political, laws and regulations, as well as any other laws or regulations, should be based on Islamic principles. This principle will in general prevail over all of the principles of the Constitution, and other laws and regulations as well. Any judgment in regard to this will be made by the clerical members of the Council of Guardians.

QANUN-I ASASI [Constitution] art. 4 (Iran), translated in 7 CONSTITUTIONS OF THE WORLD, supra note 91, at 18. Similarly, Article 94 provides that "[t]he Council of Guardians shall . . . examine [all legislation] from the perspective of its adherence to Islamic and Constitutional principles, and in case of conflict, such legislation will be returned to the Assembly for revision." Id. art. 94, translated in 7 CONSTITUTIONS OF THE WORLD, supra note 91, at 47.

93 See supra pp. 86-90.

94 See, e.g., Federal Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (asserting that when the Justices strike down restrictions on speech that they do not believe are justified by a compelling state interest, "we do not assume a legislative role, but fulfill our judicial duty — to enforce the demands of the Constitution"); Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 519 (1981) (plurality opinion) ("[i]t has been this Court's consistent position that democracy stands on a stronger footing when courts protect First Amendment interests against legislative intrusion, rather than deferring to merely rational legislative judgment in this area . . . ."); Schneider v. State, 308 U.S. 147, 161 (1939) ("This court has characterized the freedom of speech and that of the press as fundamental personal rights . . . . [T]he delicate and difficult task falls upon the courts . . . . to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.").

Given the Court's consistent Type I review of First Amendment cases, Justice Souter's concurrence in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), and then-Justice Rehnquist's opinion in City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), can only be described as bizarre. In Renton, Justice Rehnquist failed to conduct an independent inquiry into the sufficiency of the government's interest in restricting adult movie theaters, despite the fact that the city of Renton offered no evidence specific to its circumstances that would justify the regulation. See Renton, 475 U.S. at 50-52. According to Justice Rehnquist, "Renton was entitled to rely on the experience of Seattle and other cities." Id. at 51. In Barnes, Justice Souter voted to uphold a law prohibiting nude dancing based on the strength of the evidence presented in Renton — he did so even though the state legislature that enacted the regulation in Barnes had not even referred to the sort of "secondary effects" held subject to regulation in Renton. See Barnes, 111 S. Ct. at 2468-71 (Souter, J., concurring). Justice Souter thus deferred to a hypothetical legislative rationale based on a study conducted in another state. This approach is as careless as that used by Justice Black in Korematsu and Judge Bork in Dronenburg. See supra pp. 93-94. Such a failure to exercise the Court's supervisory role is troubling enough in Type II cases; I should have thought it unthinkable in a Type I situation.

Given the central importance of the First Amendment, it is not surprising that some have argued that it cannot constitutionally be repealed. See, e.g., Amar, supra note 6, at 1045 n.1 (arguing that abolition of the First Amendment would be unconstitutional because "abolition of speech would effectively immunize the status quo from further constitutional revision"); cf.
limited to those — such as free speech — whose principal role may well be to make the political process function better.\(^9\) One could argue, as Justice Black did, that all the rights enumerated in the first eight amendments have enjoyed, and should enjoy, Type I protection from encroachment by both federal and state governments.\(^6\) One could add Professor Charles Black's "structural" rights — those rights without which properly elected "checked and balanced" legislatures could not exist\(^7\) — and end up with quite a list.\(^8\)

---

\(^9\) See, e.g., U.S. Const. amend. I (guaranteeing freedom of religion); id. amend. V (prohibiting double jeopardy). Even if one could, if one wished, conceive of these rights as structural, they remain at heart classic libertarian rights to individual autonomy. Conversely, free speech, although it is protected primarily because it is necessary to the functioning of democracy, is also protected in part as a libertarian right to be oneself.

\(^6\) See infra pp. 132-33 (discussing Justice Black's constitutional theory).

\(^7\) See Black, supra note 18, at 34-35 (explaining that the guarantees of individual rights rooted in the Fourteenth Amendment can be "transferred . . . to the process of inference" made possible by the structural method of constitutional exegesis).

The content of structural rights, of course, differs from polity to polity. Thus, it can be persuasively argued that in the context of Latin America, Costa Rica's constitutional prohibition of a standing army is as much a structural safeguard for its democracy as the First Amendment and federalism are for ours. See Constitution Poltica art. 12 (1949) (Costa Rica), reprinted in 4 Constitutions of the World, supra note 91, at 3 ("The army as a permanent institution is proscribed."); see also Elaine Scarry, War and the Social Contract: Nuclear Policy, Distribution, and the Right to Bear Arms, 139 U. Pa. L. Rev. 1257, 1266-68 (1991) (arguing that the Second Amendment serves to ensure that wars will be fought only with popular consent).

Some members of today's Supreme Court seem to favor according similar Type I status to some second-order, non-enumerated structural rights that are themselves derived from the non-enumerated core concepts of separation of powers and federalism. See, e.g., Morrison v. Olson, 487 U.S. 654, 708-09, 726-27 (1988) (Scalia, J., dissenting) (arguing that any limitation on the President's power to fire a special prosecutor is an unconstitutional violation of separation of powers principles); Bowsher v. Synar, 478 U.S. 714, 733-34 (1986) (holding that the Gramm-Rudman deficit control statute violates separation of powers principles because it gives the Comptroller General, an agent of the Congress, executive powers). But it can be argued that according Type I, instead of Type III, status to these penumbral rights is just as dangerous as according such status to the penumbral rights, such as privacy, of which the current Court is so profoundly skeptical. See infra pp. 135-36 (discussing the right to privacy).

\(^8\) Judges who believe that Type I rights are relatively few and limited can nonetheless, like Justice Black, be very aggressive in defending these rights. Alternatively, they can, like Justice Stewart, be relatively restrained, or like Judge Bork, be very passive. See, e.g., New York Times v. United States, 403 U.S. 713, 714-15 (1971) (Black, J.) ("I believe that every moment's continuance of the injunctions against the newspapers amounts to a flagrant, indefensible, and
My point in this Foreword, however, is not to describe the myriad instances of Type I judicial review in American constitutional law, nor to suggest areas in which such review might be expanded. Rather, my objective is to demonstrate that, as a descriptive matter, there is also ample constitutional language and precedent supporting Type II and Type III review — albeit not always explicitly.

In finding sources for Type II review, one obviously begins with the Fourteenth Amendment equal protection language and doctrine — the most significant but by no means the only basis for the anti-discrimination principle. Dozens of Fourteenth Amendment cases have required severe judicial scrutiny — and usually invalidation — of governmental action that discriminated against various outcast groups. But much other constitutional language can be read to support Type II review as well, including the clauses forbidding the establishment of religion, uncompensated takings of property, "cruel and unusual punishment," and bills of attainder. Interestingly, although there has been one line of cases that upholds against

continuing violation of the First Amendment."); id. at 730 (Stewart, J., concurring) (agreeing that the First Amendment required vacating the injunction against the New York Times because allowing speech in this case would not surely result in direct, immediate, and irreparable damage to our nation or its people); Finzer v. Barry, 798 F.2d 1450, 1462–63 (D.C. Cir. 1986) (rejecting in an opinion by Judge Bork a First Amendment challenge to a statute that forbade the carrying of placards criticizing a foreign government in front of its embassy and required a police permit to congregate near an embassy), aff'd in part and rev'd in part sub nom. Boos v. Barry, 485 U.S. 312 (1988).

The same is true of judges who believe in many Type I rights. Justice Brennan believed in open-ended rights and was aggressive in their definition and defense. Conversely, although Justice Frankfurter was also a staunch believer in Type I rights, he was quite reluctant to use judicial power to protect them. See Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 599–600 (1940) (Frankfurter, J.) (upholding the constitutionality of a state law requiring public school students to recite the pledge of allegiance); Board of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (dissenting from the majority's determination that requiring the pledge of allegiance is unconstitutional). Activism and passivism are, in fact, quite different issues from adherence to one or another constitutional paradigm.

99 See U.S. Const. amend. XIV, § 1.
100 See infra pp. 115–18.
101 Such cases include both those in which government officials act with racist discriminatory intent, see, e.g., Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (invalidating racial school segregation); Strauder v. West Virginia, 100 U.S. 303, 307 (1879) (invalidating the conviction of a black defendant by a jury on which only white males could sit), and those in which the government pursues an ostensibly valid purpose but does so by identifying an outcast group and imposing on it a special burden, cf., e.g., Arizona Governing Comm. for Tax Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) (holding that smaller monthly pension benefits for female employees based on actuarial tables reflecting women's longer life spans violate title VII).
102 U.S. Const. amend. I.
103 See id. amend V.
104 Id. amend. VIII.
105 See id. art. I, § 9, cl. 3.
equal protection attack — incorrectly in my view — statutes or policies that do not on their face discriminate by group, but which nevertheless achieve their values by grievously burdening outcasts, 106 analysis un-

106 See, e.g., Hernandez v. New York, 111 S. Ct. 1859, 1866 (1991) (holding that the Equal Protection Clause was not violated by a prosecutor's use of peremptory challenges, despite a potentially disproportionate exclusion of Latino jurors, because in dismissing jurors who understood Spanish, the prosecutor had not acted with discriminatory intent); McCleskey v. Kemp, 481 U.S. 279, 297-99 (1987) (holding that a statistical study showing that the death penalty is imposed disproportionately on black defendants convicted for killing whites does not necessarily imply discriminatory purpose, and therefore does not demonstrate a violation of the Equal Protection Clause); Washington v. Davis, 426 U.S. 229, 248 (1976) (holding that the Equal Protection Clause was not violated when the District of Columbia administered a job test measuring verbal ability, vocabulary, and reading comprehension on which black police officer applicants performed worse than white applicants).

This is not to say that Type II jurisprudence does not recognize a distinction between core equal protection cases, in which a government official has expressly classified and burdened an outcast group (for whatever purpose, discriminatory or not), and Washington v. Davis type cases. In Type II review, given the focus on impact, the distinction is simply not dispositive. As I have already discussed, outcast groups may be burdened in two ways: they may be stigmatized by the very act of being classified, and they may be practically disadvantaged by the effect of the law. The stigmatic harm inflicted when the government does the classifying is frequently sufficiently great to make even the most trivial practical disadvantage — being deprived of drinking from common water fountains, for instance — a violation of a fundamental right. But even when the stigmatic harm is less because the government is not actually classifying according to membership in an outcast group, the practical disadvantage imposed on an outcast group by the government action may still be so great that the action should be deemed a violation of a fundamental right. In this category might fall disadvantages such as scoring worse on a reading and vocabulary test and thus being deprived of a job on a police force, or being the only ones required to donate kidneys for transplant. See supra p. 99.

Of course, core equal protection cases differ from Washington v. Davis type cases in another fundamental but ultimately nondeterminative respect. By definition, we know that the group being burdened in a core equal protection case is an outcast group. One simply reads the statute or listens to the stated policy that mentions, for example, a racial classification (in some circumstances, one can also infer from other evidence — an internal government memo perhaps — that the government has classified by race). The same is not true in Washington v. Davis type cases; Type II review in such cases requires more work. In these cases, the primary group that is burdened is, again by hypothesis, not an outcast group. Thus, for example, the primary disadvantaged group in Washington v. Davis was those who fared poorly on such tests, the "less literate," and in the kidney example, "all the best donors." Type II review must look behind this grouping and explore whether the "less literate" applicants were mainly members of an outcast group and the "more literate," generally not, whether the best kidney donors were those with recessive sickle cell anemia (blacks) or recessive Tay Sachs (Jews). This is often not an easy determination, to be sure, but its difficulty cannot be an excuse for not trying. That would be much like saying that the difficulty of distinguishing between an (intentional) taking and "mere regulation" justified the conclusion that a regulation could never be a taking, even if the private owner is left with totally valueless property. The need to examine the degree to which those who bear the bulk of the burden in Washington v. Davis situations are outcasts goes to the very heart of Type II reasoning. If a significant burden is also placed on people who hold legislative power, then — just as in cases in which adequate compensation of the losers is required or analogous burdens are placed on "all of us" — the legislative decision is deserving of great respect because it is truly majoritarian. If, instead, the burden rests mainly on outcasts, the legislative decision is as suspect as would be an attempt to build a public park without compensating the landowner whose property was taken.
der other clauses of the Constitution has frequently focused on impact rather than intent.\(^{107}\)

Of course, one can view some of these clauses, such as the Cruel and Unusual Punishment Clause, as barring certain actions even if they are conducted in a nondiscriminatory way. Such a Type I view is probably appropriate for some “punishments” such as torture.\(^{108}\)

\(^{107}\) For example, violations of the Establishment Clause and incidences of cruel and unusual punishment have been held unconstitutional without regard to intent. See, e.g., Gregg v. Georgia, 428 U.S. 153, 172-73, 183 (1976) (explaining that the Eighth Amendment prohibits punishments that are “grossly out of proportion to the severity of the crime,” that involve the “unnecessary and wanton infliction of pain,” or that are “totally without penological justification”); Lemon v. Kurtzman, 408 U.S. 602, 612 (1972) (explaining that to be constitutional, a statute’s “principal or primary effect must be one that neither advances nor inhibits religion”); supra p. 93 (discussing the irrelevancy of intent to takings claims). But cf. Tribe, supra note 10, § 14-10, at 1214 (“Eighth Amendment claims based on official conduct that does not purport to be the penalty formally imposed for a crime require inquiry into state of mind . . . .”). In its most recent Eighth Amendment case dealing with prison conditions, Wilson v. Seiter, 111 S. Ct. 2321 (1991), the Court held that prisoners must prove intent amounting to “deliberate indifference” on the part of a prison official before a cruel and unusual punishment challenge can be maintained. See id. at 2326. This case is yet another example of the Court’s troubling and increasing reluctance in non-economic contexts to take an impact-based view of its role.

\(^{108}\) See, e.g., Charles Black, Mr. Justice Black, the Supreme Court, and the Bill of Rights, HARPER’S MAGAZINE, Feb. 1961, at 63, 67 (“[T]he right not to be tortured is entirely unsuitable for ‘balancing’ against competing considerations of convenience, comfort, and safety . . . .”).

Does Type I apply to the death penalty as well? That is, is that punishment sufficiently violative of fundamental rights to be barred regardless of how “fairly” or nondiscriminatorily it is applied and how openly and thoughtfully it is enacted? Different Type I proponents would of course look to different sources to decide that question. Some would look to the specific intent of the Framers. See, e.g., Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 CAL. L. REV. 839, 859-60 (1969) (arguing that the Framers misinterpreted the historical meaning of language in the English Bill of Rights that supplied the language of the Eighth Amendment). Others — more wisely — would ask whether capital punishment is viewed today in the same way that the Framers viewed punishments that they considered to be cruel and unusual. See, e.g., Furman v. Georgia, 408 U.S. 238, 241-42 (1972) (Douglas, J., concurring) (referring to the evolving standards for punishment in a humane and maturing society). One way to make such a comparison would be to see if factors such as rarity of imposition and prevalence of extreme procedural protections for capital punishment make it resemble those rarely imposed and procedurally hedged punishments that existed in England but were clearly viewed by the Framers as cruel and unusual (such as drawing and quartering and flogging from town to town). Other Type I proponents — such as Justice Frankfurter — would look to whether English-speaking peoples have capital punishment. See, e.g., Rochin v. California, 342 U.S. 165, 169 (1952) (noting that regard for the requirements of due process requires the Court to determine whether proceedings “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples” (quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., concurring))). Still others would simply look to general philosophy or search their souls. See, e.g., Gregg, 428 U.S. at 228-31 (Brennan, J., dissenting) (arguing that capital punishment always violates the Constitution); id. at 231-32 (Marshall, J., dissenting) (same).

On the Court today, the majority seems to consider only whether a national “consensus” exists against capital punishment — a most implausible view of the Court’s role with respect to
But a proponent of Type II would also read the clause as barring some punishments only when they are, for example, applied to "them" and not to "us," to those who kill or rape "us" and not to those who kill or rape "them."\(^{109}\)

What is striking is that, whatever one ultimately thinks of Ackerman's general thesis,\(^{110}\) Type II review has been supported by crucial language or by leading cases directly associated with each of the three great Constitution-making moments of our history — the founding, the post-Civil War Reconstruction and the New Deal. The Constitution in general and the Bill of Rights in particular are replete with language indicating an abhorrence of discrimination, slavery being the tragic exception.\(^{111}\) The Thirteenth,\(^{112}\) Fourteenth,\(^{113}\) and

Type I rights even if the search for consensus were adequately conducted, which it usually is not. See, e.g., Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989) (holding that capital punishment of 16- and 17-year-old murderers does not constitute cruel and unusual punishment in part because the various state laws failed to demonstrate a consensus condemning such a use of capital punishment). If consensus is the goal, why should it stop at the national border? Why should it not look to other democracies that share many of our values? Justice Frankfurter may have suggested such an approach through his infelicitous and offensive phrase "English-speaking peoples," which nevertheless is much sounder in its aims than Justice Scalia's search for a national consensus. Scalia's search was particularly questionable in Stanford. See infra pp. 143–45. With Justice Scalia's strange use of consensus one should compare Justice Stewart's use of similar language in Gregg. See Gregg, 428 U.S. at 179 (referring to "society's endorsement of the death penalty for murder"). Justice Stewart was not, of course, engaged in Type I jurisprudence in Gregg, but rather was looking at the results of the Type III remand the Court had decreed in Furman.

Strikingly, in a case last Term in which consensus would have suggested that a punishment was unusual, to say the least, Justice Scalia, writing for the Court, nevertheless held that such a consensus was not enough to bar the punishment. See Harmelin v. Michigan, 111 S. Ct. 2680, 2698–99 (1991) (upholding a life sentence without parole for first-time possession of one and one-half pounds of cocaine).

\(^{109}\) A person who believes that the Cruel and Unusual Punishment Clause was primarily an antidiscrimination clause would focus attention on whether the punishment was applied equally to all similar murderers or only to those whose killings seemed worse because of the polity's biases. See, e.g., Furman, 408 U.S. at 248–49 & n.111 (Douglas, J., concurring) (arguing that statutes that leave juries untrammeled discretion in imposing the death penalty violate the Eighth and Fourteenth Amendments). Thus, such a person would strike down death penalty laws if they were applied disproportionately to outsiders. But she would also strike them down if the killing of insiders were systematically viewed as a more heinous crime than the killing of outsiders. To such a person McCleskey v. Kemp, 481 U.S. 279 (1987), would be the ultimate failure of the Court to do its job.

\(^{110}\) See supra pp. 106–07 (discussing Ackerman's thesis).

\(^{111}\) Among the clauses having an antidiscrimination component are the Cruel and Unusual Punishment Clause, U.S. Const. amend. VIII, the Bills of Attainder Clause, id. art. I, § 10, cl. 1, the Establishment Clause, id. amend. I, and the Takings Clause, id. amend. V. But see Amar, supra note 45, at 1133 (arguing that the Bill of Rights' original purpose was mainly to protect against abuse by the federal government and not to protect against discrimination).

\(^{112}\) U.S. Const. amend. XIII (prohibiting slavery).

\(^{113}\) U.S. Const. amend. XIV (requiring states, inter alia, to provide "equal protection of the laws").
Fifteenth Amendments, together with a great deal of post-Civil War legislation such as the Freedman's Bureau laws, are critical to antidiscrimination theory. And the unmistakable assertion of Type II authority in United States v. Carolene Products, when the New Deal Court was busily renouncing much of its Type I jurisprudence, completes the picture. Indeed, it is hard to think of any principle

114 U.S. Const. amend. XV (prohibiting discrimination in voting rights "on the basis of race, color, or previous condition of servitude").

115 Freedman's Bureau Acts, ch. 90, 13 Stat. 507 (1865); ch. 200, 14 Stat. 173 (1866); ch. 135, 15 Stat. 83 (1868). The Freeman's Bureau Acts of 1865, 1866, and 1868 created, and later extended the operations of, a federal agency designed to assist southern refugees and freedmen, particularly blacks, in areas such as medical aid, education, and land acquisition. See Eric Schnapper, Affirmative Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753, 760-83 (1985).

116 The Civil War amendments not only represented dramatic statements and applications of the principle in themselves, but they also came to require the application of almost all previous federal constitutional antidiscrimination notions to the states as well as to the national government. In this regard, the Fourteenth Amendment's Equal Protection Clause must be read together with the Thirteenth and Fifteenth Amendments as an affirmation of the underlying antidiscrimination principle itself. Similarly, the contemporaneous Freeman's Bureau laws demonstrate that "affirmative action" was not necessarily a violation of that principle. See Freeman's Bureau Act, ch. 200, 14 Stat. 173, 175 (1866) (conveying disputed lands to "heads of families of the African race"). "From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks." Schnapper, supra note 115, at 754. To the extent one is concerned with either original intent or language, it is hard to avoid the conclusion that the Civil War amendments applied the antidiscrimination principle explicitly to former slaves and broadened its scope with respect to both the states and with respect to other more general discriminatory practices not enumerated in the original charter. Cf. Amar, supra note 45, at 1136 (stating that the view of the Bill of Rights as a preeminently antidiscrimination document stems from the post-Civil War period).

117 304 U.S. 144 (1938).

118 In the New Deal reworking of the Constitution, the Court abandoned certain libertarian, Type I pretensions that had increasingly influenced its behavior over the previous 30 or 40 years. The Court stopped defending many previously assumed fundamental rights, such as the property rights protected in the earlier Lochner era. See supra note 11; see also Cass R. Sunstein, Constitutionalism After the New Deal, 101 Harv. L. Rev. 421, 438 (1987) (arguing that the New Deal involved the abandonment of some rights enshrined in the existing common law). At the same time, however, it immediately and forcefully reasserted its role when discrimination was involved. This was the great significance of Carolene Products, for it signalled that although it was retreating from a libertarian, Type I view of the Constitution, the Court was in no way abandoning its role under the antidiscrimination prototype.

That this approach was based not merely on the equal protection language in the Constitution, but on a broader antidiscrimination principle, can be seen in cases such as Bolling v. Sharpe, 347 U.S. 497 (1954). In that case antidiscrimination principles were used to invalidate federal racial segregation policies in Washington, D.C. public schools, despite the absence of any equal protection language in the Constitution applicable to the federal government. See id. at 499-500. Bolling has meant that the requirements placed on the states by Brown v. Board of Educ., 347 U.S. 483 (1954), apply to the federal government through the Fifth Amendment Due Process Clause. Yet the Fifth Amendment neither has in it, nor can be read to incorporate, the Fourteenth Amendment's equal protection language. See Steven G. Calabresi, Note, A Madisonian Interpretation of the Equal Protection Clause, 91 Yale L.J. 1403, 1420 (1982).
of our Constitution, not even the separation of powers or federalism, that has been more resoundingly reaffirmed at all three times than the antidiscrimination principle.

Traditional doctrine also supports Type III review. Here, I need not go into great detail because Alexander Bickel's writings have already made the case.\textsuperscript{119} The hoary doctrine requiring strict interpretation of statutes in derogation of the common law can be seen as representing judicial control of hasty or ill-considered legislation. A core purpose in narrow, and often destructive, construction of such statutes is ensuring that the legislature will make rights-implicating changes in the common law only after explicit and thoughtful consideration. Similarly, the "modern American Doctrine which refuses to impute to Congress the casual intention to make vast and far-reaching changes . . . in the federal balance,"\textsuperscript{120} can be seen as a judicial device for forcing caution and consideration in legislation that affects fundamental structural rights. The \textit{Lincoln Mills} case\textsuperscript{121} and Chief Justice Hughes's magisterial opinion in \textit{Sorrells v. United States}\textsuperscript{122} present similar methods of judicial control.

Type III review also can be used to prevent legislatures from hiding, that is, to keep them from avoiding difficult issues that may be politically dangerous to decide openly. To prevent such evasion of responsibility, a court may strike down a law or regulation that infringes on a constitutionally penumbral right and require a clearer statement from Congress. Thus, in \textit{Kent v. Dulles}\textsuperscript{123} the Court held that Congress's delegation of power to issue passports to the Secretary of State did not give the Secretary unbridled discretion to restrict a citizen's right to travel.\textsuperscript{124} If Congress wanted to allow the Secretary to deny passports to communists, as he had been doing, Congress would have to grant the authority explicitly.\textsuperscript{125} Further typical ex-

\begin{footnotesize}
\footnotesize
\begin{enumerate}
\item See sources cited \textit{supra} note 68.
\item Bickel & Wellington, \textit{supra} note 68, at 8.
\item 287 U.S. 435, 446, 452 (1932) (upholding an entrapment defense and rejecting the government's literal interpretation of a statute as an unintended consequence of casual legal language).
\item 357 U.S. 116 (1958).
\item See \textit{id.} at 128-29.
\item See \textit{id.} at 130. Because the Court held that Congress had not explicitly delegated authority to restrict the travel of communists, the Court did not rule on the constitutionality of such a restriction. See \textit{id.} at 129-30.
\end{enumerate}
\end{footnotesize}

Even the traditional principle that statutes should be interpreted strictly to avoid a constitutional issue 130 is a classic example of a Type III judicial role. The principle rests on the notion that judges should not attribute to the legislature an intention to impinge on fundamental rights unless the legislature has carefully considered the issue and clearly expressed its intention. 131

126 487 U.S. 815, 857 (1988) (raising the possibility that state legislatures did not realize children could be executed under their own statutes).
127 408 U.S. 238, 240 (1972) (per curiam) (remanding to the states, in effect, the issue of the constitutionality of the death penalty); see also Gregg v. Georgia, 428 U.S. 153, 179–81 (1976) (plurality opinion) (accepting the states' reaffirmation of capital punishment).
128 360 U.S. 474, 506–07 (1959) (finding that a loyalty security program established administratively, which did not permit confrontation of witnesses, was unlawful without explicit executive or congressional authority).
130 See, e.g., Rust v. Sullivan, 111 S. Ct. 1759, 1788 (1991) (O'Connor, J., dissenting) (arguing that the Court should not reach "constitutional questions unnecessarily"); see also infra pp. 141–42 (discussing *Rust* in detail).
131 The doctrine that typifies, as much as any, the Type III anti-hiding approach is, of course, nondelegation. This doctrine, often declared dead after the New Deal, has shown repeated signs of life — albeit in many cases implicitly. Obviously, what was unconstitutional to Chief Justice Hughes in the 1930s as undue delegation, see, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (holding unconstitutional a statute delegating to the executive the authority to approve industry-written "fair trade" codes); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935) (rejecting presidential regulations on the petroleum industry as the product of an unconstitutionally broad and standardless delegation of legislative power), would typically not be so today. But this is not because the concept of undue delegation has changed. Rather, it is because the entitlements to which the concept was applied no longer seem even putatively fundamental. *See supra* note 11 (discussing the rise and fall of the *Lochner* era). The doctrine can thus be readily applied to new cases in which a challenged rule approaches the violation of fundamental rights. In the 1950s, for example, Justices Black and Douglas and Chief Justice Warren sought to use Chief Justice Hughes's nondelegation doctrine to require legislative second looks in several cases. See, e.g., *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (involving the creation of loyalty security programs); *Barenblatt v. United States*, 360 U.S. 109, 140 (1959) (Black, J., dissenting) (arguing that because the House Un-American Activities Committee's power to investigate communist activity threatened First Amendment rights, such power should be recognized only if explicitly delegated by Congress); *Kent v. Dulles*, 357 U.S. 116, 129 (1958) (involving rules restricting the issuance of passports). At the same time, they all assumed that Chief Justice Hughes's cases were wrongly decided because they involved such (by then) settled issues as the extent of the federal commerce power. *See Barenblatt*, 360 U.S. at 140 n.7; *Kent*, 357 U.S. at 129. Chief Justice Warren's opinion in *Greene* originally included citations to Chief Justice Hughes's second look opinions. *See Greene*, 360 U.S. at 474. They were removed at the request of Justice Douglas, as Justice Black told me when I clerked for him, because — I believe — Justice Douglas did not want the possibility of a second look to be emphasized in *that case*. In *Kent* however, Justice Douglas himself made
Why are antidiscrimination and constitutional accountability so important in the United States? It is too long a story to discuss in any depth here, but a few historical and sociological observations may be worth noting.

As for anti-scapegoatism and antidiscrimination, one observation comes immediately to mind. We are a nation of immigrants; a nation of slaves and of slave owners; a highly heterogenous society in which many groups at various times — and still today — feel, often justifiably, consistently excluded. Discrimination and scapegoatism have been our curse and our history. The occasional victories over these sins have been our true glories. The danger remains as
great today as ever that we will assert values in our governmental institutions that we cannot really live up to and instead impose the burden of protecting those values on the outcasts of our society.

Several reasons explain our desire for Bickellian constitutional accountability. Our checks and balances, separation of powers, and federalism all increase the ease with which legislatures and executives can hide, singly and in combination. They allow government decisionmakers to duck the real issues and, if pressed, to blame someone else. Checks and balances in particular impede the repeal of old laws, including those that have over time come to violate entitlements that philosopher-judges deem fundamental; and this survival of old laws is a particularly important, if frequently unnoticed, form of hiding.136 Two factors may explain the special danger in America of hasty and ill-considered legislation. The lack of strong party discipline and structures means that laws are often patched together quickly toward the end of a legislative session.137 And the rootlessness of our frontier

David J. Garrow, Bearing the Cross: Martin Luther King, Jr., and the Southern Christian Leadership Conference (1986).

136 Compare, e.g., Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (refusing to declare unconstitutional a Georgia anti-sodomy statute enacted in 1816 and rarely enforced) with Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding unconstitutional a nineteenth-century statute outlawing the use of contraceptives even though the Connecticut state legislature persistently refused to repeal the law). The statute in Griswold presents a prime example of hiding through the failure to repeal old laws. When the Connecticut statute outlawing the use of contraceptives was enacted in 1879, it was quite consistent with many state laws and with the then-prevailing view of rights in this country. Over the years, however, attitudes changed, and the law came to be viewed by many as violating fundamental rights. Still, one can sympathize with the position taken by Justices Stewart and Black — and also, of course, by Judge Bork — that it was hard to find in the Constitution any Type I prohibition against such an "uncommonly silly law," Griswold, 381 U.S. at 527 (Stewart, J., dissenting). The problem was simply that the law, although unwanted, unworkable, and incapable of reenactment, was politically hard to repeal. It was easier for legislators to use checks and balances to duck the issue than to vote one way or the other on it. For a discussion of Griswold, see Calabresi, supra note 72, at 8–9, 21.

Philosopher-judges may have been right that contraception had come to be viewed as a fundamental right. Justices Black and Stewart and Judge Bork were also right, however, that judicial recognition of contraception as a Type I right meant, in fact, that no principled limit on court creation of Type I rights could thereafter be easily established. See Griswold, 381 U.S. at 521, 524 (Black, J., dissenting); Bork, supra note 5, at 99–100. The correct answer lay not in Bork's criticism of the decision, but rather in a Bickellian remand that would have forced the legislators to speak out if they truly favored such a law. If legislators were unwilling to reenact the law, this new non-Type I right should have been left unviolated as a result of inertia. See Bickel, supra note 6, at 147–49, 154 (recommending the use of the concept of desuetude by the Court in the predecessor case to Griswold, Poe v. Ullman, 367 U.S. 497 (1961), to force a second look at the Connecticut law and arguing that desuetude had been implicitly recognized by Justice Frankfurter's majority opinion in Poe); see also Calabresi, supra note 72, at 129–31, 135–38 (discussing factors leading to judicial reconsideration of old laws). This is not to say that Griswold — like Bowers — did not raise Type II issues as well.

immigrant society makes us particularly prone to fads, to demands
for conformism from “outsiders” (all of us at one point or another),
and to the requirement that we prove ourselves to be 120% Ameri-

138 These factors lead to bursts of haste and its excesses when a
fad or a passion arises. They also lead to a polity that needs, but has
never been able to create in its legislative process, safeguards against
such windbursts.139 None of these concerns matters terribly much if
hastily enacted or issue-ducking laws are relatively trivial. But when
such laws touch areas where government perhaps ought not to tread,
at a minimum a thoughtful legislative consideration that focuses the
eyes of the people squarely on the law in question is required.140

passed in a last-minute rush at the end of a congressional session is unlikely to be understood,
let alone supported on its merits, by a majority of the people’s representatives.” Id. at 321–22.
He indirectly ascribes the cause to “[d]ivided party government, interest group control, [and] institutional fragmentation of power.” Id. at 321.

138 For example, Representative Gerald Solomon of New York, who favored a constitutional
amendment to ban flag burning, accused House Speaker Thomas Foley, who opposed it, of
“deliberately gagging 10 million veterans” and “kowtowing to ilk like the Communist Youth
Brigade.” Chris Harvey, Speaker Hurries Flag Vote, WASH. TIMES, June 21, 1990, at A5
(quoting Gerald Solomon). For further discussion of the anti-flag burning hysteria and its
implications for judicial review, see note 86.

139 Fear of popular passion was, of course, one of the reasons for the complex system of
checks and balances the Framers created. See, e.g., THE FEDERALIST No. 62, at 378–79
(James Madison) (Clinton Rossiter ed., 1961) (arguing that the Senate would provide a bulwark
against “improper acts of legislation” and “the impulse of sudden and violent passions”). Time
has added more checks and balances to the system, most importantly through the creation of
powerful legislative committees, which are perhaps the major current, non-constitutional “check”
on populist frenzies. Occasionally, these committees have successfully played the role of mini-
Houses of Lords. When the wind of passion is strong enough, however, these legislative
committees have frequently proven inadequate to the task, even on issues whose lasting majority
support is more than doubtful. For example, as Chairman of the House Judiciary Committee
during the height of the McCarthy Era, Representative Emanuel Celler managed for years to
prevent extreme anticommunist legislation from leaving his Committee. See N.Y. TIMES, Mar.
2, 1955, at 27 (Celler introducing a bill to require court approval before wiretapping and to
limit wiretapping to cases involving national security or kidnapping); Celler Schedules Wiretap
Hearings, N.Y. TIMES, Mar. 17, 1955, at 78 (Celler calling the illegal use of wiretapping power
a “racket”); Celler Asks Curb on All Wiretaps, N.Y. TIMES, Mar. 24, 1955, at 22 (Celler
continuing to resist internal security legislation by declaring that wiretaps should not be permitted
at the discretion of the Justice Department, but rather only after a court order from a federal
judge); 2 in House Score Leak Proposals, N.Y. TIMES, June 24, 1957, at 12 (Celler declaring
that legislative proposals on wiretapping promoted by Commission on Governmental Security
would be unconstitutional). But Celler could not hold back the political forces forever, and his
Committee eventually approved a wiretapping bill. See Wiretap Bill Gains, N.Y. TIMES, May
15, 1958, at 59 (Celler’s subcommittee approving a compromise bill authorizing the use of
wiretapping evidence in federal court cases involving espionage, treason, subversion, or kidnap-
ping). I discuss the tension between haste and hiding with respect to checks and balances
above. See supra note 70.

140 “The point after all is to ask Congress for sober reconsideration, leaving to Congress the
last word. To raise constitutional doubts is to inhibit future legislative action.” Bickel &
Wellington, supra note 68, at 34. Justice Stone noted that every law must ultimately be based
B. The Canadian Approach

The Canadian Constitution seems to me to be, at least nominally, a wonderful example of an essentially Bickellian constitution. That is certainly one way of viewing the celebrated non-obstante clause within its bill of rights.141 The non-obstante clause says that even enumerated rights — provisionally enforced by the Supreme Court — may be abrogated by the legislature, but only if the legislature explicitly decides to do so.142 This legislative intention to violate a right, moreover, must be restated at least every five years.143 How all this will be worked out remains to be seen. There are indications, for example, that some provinces are trying to avoid its second-look objectives.144 Whatever ultimately happens, the explicit recognition of Type III approaches in the Canadian Constitution make that charter worthy of particular attention.

The Canadian approach is also interesting because there are exceptions to the non-obstante clause in the bill of rights. These exceptions affect subjects, including “language” rights, that apparently require stronger antidiscrimination protections — Type II review.145 In

---


142 See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33; Weiler, Rights and Judges in a Democracy, supra note 141, at 81-82.

143 See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33. The requirement of reenactment after five years is a twist that Bickel himself never called for. It is, however, profoundly Bickellian and shows how much those who pushed for the Canadian Charter understood the underlying reasons for what they did. Cf. Calabresi, supra note 72, at 133-34 (discussing the appropriateness of sunsetting for a statute that “does not fit the law at large and is no longer supported by the circumstances that engendered it”).

144 In June 1982, Quebec passed a law purportedly reenacting every Quebec statute with an added “notwithstanding the Charter” clause. See Weiler, Rights and Judges in a Democracy, supra note 141, at 90 n.114. One might argue that such a law does not undermine the importance of a second look; it merely makes the second look coincident with the first look. Such an argument, however, misses the point of requiring a second look. The legislature is supposed to look at the law at a later time and in that way to consider the Court’s statements on the law, to weigh public opinion, to wait for any crises to mellow, and generally to reflect further on the issue.

It is precisely for this reason that second look has become an increasingly popular mode of decisionmaking in the United States. See, e.g., CONN. CONST. art. XII (requiring proposed constitutional amendments to be passed by two consecutive state legislatures before being submitted to popular referendum, unless the initial legislative vote is greater than three-fourths in favor).

145 The right to use either English or French in all official proceedings and the right to

HeinOnline -- 105 Harv. L. Rev. 124 1991-1992
these areas, nondiscrimination seems to be mandated as firmly as in the United States in the sense that there is no simple second-look option. The antidiscrimination principle, however, does not seem to apply in the general way that it does in the United States; rather, it applies only to specific areas in which discrimination is especially feared. This structure suggests a realization that particular kinds of discrimination are prevalent in Canada and extremely dangerous, but, at the same time, reflects a less general fear of the exclusion of groups from the political processes.

C. The English Approach

England is, of course, considered a great example of a nation using a Type IV approach in which fundamental rights are deemed to be best determined and protected by the legislature. Again, a few choose to have one's child instructed in either English or French are at the core of the rights exempted from the non-obstante clause. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), §§ 16–23. For a detailed discussion of the language rights issue in Canada, see RONALD WARDHAUGH, LANGUAGE & NATIONHOOD: THE CANADIAN EXPERIENCE (1983).

146 The need for judicial control over language discrimination, despite the general second-look framework that guarantees the last word to legislatures in most instances, is obvious to anyone acquainted with Canadian history. See generally ANNE F. BAYESKY, CANADA'S CONSTITUTION ACT 1982 AND AMENDMENTS 944-64 (1989) (presenting a documentary history of Canadian constitutional politics, particularly relating to negotiations with Quebec over language rights); THE MEECH LAKE PRIMER: CONFLICTING VIEWS OF THE 1987 CONSTITUTIONAL ACCORD 209–31 (Michael D. Behiels ed., 1989) (describing historical tensions between Canada's English-speaking majority and French-speaking minority).

147 The absence of a felt need for ultimate judicial power to avoid discrimination in general is not easily explained. After all, Canada, like the United States, is a nation of immigrants. Perhaps it stems from the nature of Canadian immigration, which, until World War II, derived predominantly from the United Kingdom. Approximately two-thirds of pre-war immigration was from the British Isles and northern Europe. See 5 ENCYCLOPEDIA CANADIANA 236–37 (1972). Post-war migration to Canada was much broader. See id. at 237–38. In the atmosphere that followed World War II, this immigration perhaps has given rise to less intolerance than characterized the United States' reaction to earlier and poorer immigrants. More likely, the reason behind the relative lack of caste discrimination in Canada is the absence of slavery and all that followed from it. The non-obstante clause approach to general discrimination may, instead, derive simply from the desire to compromise between U.S. and British constitutional approaches. Whatever the reasons, though, the result remains distinct, and distinctly suited to Canadian history and reality.

Of course, none of this is to say that Canada is free from racial discrimination against its non-white minorities. See, e.g., Clyde H. Farnsworth, Montreal Journal; Quebec's New Minority Issue: Blacks Charge Bias, N.Y. TIMES, Aug. 16, 1991, at A4. See generally ROBERT A. HUTTENBACK, RACISM AND EMPIRE: WHITE SETTLERS AND COLORED IMMIGRANTS IN THE BRITISH SELF-GOVERNING COLONIES, 1830–1910, at 125–27 (1976) (describing racist attitudes common to English colonies, including Canada); W. PETER WARD, WHITE CANADA FOREVER (1973) (describing Canada's century of hostility toward Asian immigrants).

148 See O. HOOD PHILLIPS & PAUL JACKSON, CONSTITUTIONAL AND ADMINISTRATIVE LAW 25 (7th ed. 1987) ("Parliament can legally pass any sort of law whatsoever."); see also G. W. Jones, The British Bill of Rights, 43 PARLIAMENTARY AFF. 27, 29–30 (1990) (noting that the British have historically believed that their fundamental rights would not be threatened by
possible explanations come to mind. England has long described itself as a homogeneous country in which discrimination was a problem that could be adequately handled through ordinary political processes.¹⁴⁹ As for avoiding hastiness and hiding, that of course, has always been one of the supposed justifications for requiring the House of Lords to approve all laws.¹⁵⁰

More recently, the decline of the political power (as distinguished from the judicial power) of the House of Lords, has undermined the role that body can play in checking hasty legislation. Commentators now suggest that hasty or thoughtless infringement of rights is not a serious problem because the rootedness of the society, the possibility of easy repeal of laws, and the strictness of party organization and discipline, all combine to make "last minute" legislation less likely.¹⁵¹

parliamentary supremacy). Some may argue that, because England has no formal written constitution, it is meaningless to talk of its having any conception of judicial review. England may indeed represent a regime with only Type IV protections, but this is not simply because it lacks a written constitution. A written constitution does foster judicial review; it may even require it. But countries without written constitutions can still have healthy traditions of judicial review. See, e.g., Simeon C.R. McIntosh, West Indian Constitutional Theory: An Essay, 32 How. L.J. 735, 759-60 (1989) (arguing that a written constitution is not a necessary or sufficient condition for judicial review).

¹⁴⁹ See, e.g., Jones, supra note 148, at 29 (stating that Britain has never needed a constitution or bill of rights to protect individuals because "[t]he people on the whole have trusted their rulers and each other. . . . The trust of each other arose [partially because] . . . [t]hey were a population that was not as mixed as those in many other countries. There were few glaring differences of race, religion, ethnic origin or colour.").

¹⁵⁰ Lord Carrington has argued that the role of the House of Lords is to provide "further consultation" and "second thoughts" before legislation is enacted. See, e.g., 365 Parl. Deb., H.L. (5th Ser.) 1742 (1975). The House of Lords can no longer stop legislation desired by the Commons, but it can slow legislation down for two years. The Parliament Act, 1911, 1 & 2 Geo. 5, ch. 13, § 2, and the Parliament Act, 1949, 12, 13, & 14 Geo. 6, ch. 103, made it possible for the House of Commons to enact legislation over the disapproval of the House of Lords. Under the Acts, the Lords have retained only the power of delay. To override a veto or simple inaction on non-fiscal legislation by the Lords, the House of Commons must simply approve an act in two successive sessions and allow one year to elapse between the second reading and final passage. See J.A.G. Griffith & Michael Ryle, Parliament: Functions, Practice, and Procedures 240-44 (1989); see also Donald Shell, The House of Lords 203-07 (1988) (describing the change in understanding of the Lords' power to delay and its infrequent use in recent years).

The House of Lords, however, has recently tried to defend the antidiscrimination principle through its much reduced powers as critic and delayer of legislation. The 26 Anglican bishops in the House of Lords, led by Lord Ramsey, Archbishop of Canterbury, took strong stands against discriminatory changes in immigration laws. See Dennis Hevesi, Lord Ramsey, 83, Dies in Britain; Former Archbishop of Canterbury, N.Y. Times, Apr. 24, 1988 at 34 (discussing the role of Ramsey and other bishops in the House of Lords in fighting discriminatory legislation).

¹⁵¹ Some British commentators emphasize the role of internal opposition in Parliament itself in protecting rights. See, e.g., Donald R. Shell, The British Constitution in 1989, 43 Parliamentary Aff. 397, 397 (1990) ("T[he two party system, with a strong opposition contesting with the government for power, has provided a form of checks and balances, which elsewhere has been derived from a written constitution.").
These commentators also contend that hiding is not a serious problem because responsible legislatures are open and do update laws.\(^{152}\)

Nevertheless, although the Canadian approach to judicial review seems to me to be interestingly appropriate for Canada,\(^{153}\) I find much that is subterfuge in the English approach, even for England. The danger of haste and hiding is there, and in fact, English courts do often exercise Type III authority — perhaps increasingly since the decline of the House of Lords — allegedly over the administration and the bureaucracy, but in effect over the legislature as well.\(^{154}\) This supervision ends up being very similar to American and Canadian Type III jurisprudence, even though it is effected through broad interpretation of statutes and ultra vires and delegation notions rather than through formal doctrines of judicial review.\(^ {155}\) But there are limits to what can be done indirectly, and one wonders whether British rootedness does sufficiently protect rights or whether a bill of rights with a non-obstante clause would not serve England better today.\(^ {156}\)

\(^{152}\) Cf. Jones, *supra* note 148, at 30 (describing traditional British reliance on elected bodies subject to effective political pressures to bring about necessary legal redress).

\(^{153}\) Canada's judicial review system may not, however, adequately protect racial minorities. See sources cited *supra* note 147.

\(^{154}\) See A.P. Le Sueur, *The Judges and the Intention of Parliament: Is Judicial Review Undemocratic?*, 44 *PARLIAMENTARY AFF.* 283, 289 (1991) ("In fact, under the existing constitution, judges already have power to set aside legislation."). Courts may disregard the intent of Parliament by interpreting only the text of a statute, *see id.* at 284, or may disregard the language based on the "policy or purpose behind the legislation," *id.* at 286. But the most important exercise of Type III power is in the realm of "subordinate legislation," regulations authorized by Parliamentary delegations of legislative power. Even if the regulation must be approved by both Houses of Parliament and has been so approved, the courts can declare the regulations ultra vires as "not strictly in accordance with the Act" on the grounds that the ratification was not "an Act of Queen, Lords, and Commons . . . immune from judicial review." *SIR WILLIAM WADE, ADMINISTRATIVE LAW* 863 (6th ed. 1988).

\(^{155}\) See, *e.g.*, Fairmount Invs. Ltd. v. Secretary of State for the Env't, [1976] 1 W.L.R. 1255, 1263 (H.L.) (classifying lack of procedural justice as ultra vires on the grounds that "it is to be implied, unless the contrary appears, that Parliament does not authorize . . . the exercise of powers in breach of the principles of natural justice"); Regina v. Miah, [1974] 1 W.L.R. 683, 694 (H.L.) (barring prosecution by interpreting a statute to make it consistent with the prohibition on ex post facto laws in the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 7, 213 U.N.T.S. 221, 228); Central Control Bd. v. Cannon Brewery Co., [1949] App. Cas. 744, 752 (H.L.) (rejecting executive action as an ultra vires act in light of the presumption "that an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms"). The result is that, in spite of the lack of the "constitutional status of their American . . . [counterparts, British judges] have staked out for themselves a strong and well-defined position as the protectors of the citizen against unlawful acts of government." **BERNARD SCHWARTZ & H. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES** 11 (1972).

\(^{156}\) Some distinguished British judges and scholars favor creating a written bill of rights for
More serious than the problems of hiding and haste, in my view, is the illusion of cultural homogeneity underpinning the belief that England does not need antidiscrimination protections. Think of the recent English citizenship laws designed to limit immigration from the former colonies and their link to the massive influx into Britain of people of color. If England was once homogenous, is it at all so today?\textsuperscript{157}

At the same time, the texture of discrimination in English life may still be quite different from that in the United States. Historically, discrimination in England revolved more around class differences than around ethnic or racial backgrounds.\textsuperscript{158} Class biases are more difficult


\textsuperscript{157} Recent legislation suggests that Britain is now feeling the pressures of a more heterogenous population. \textit{See, e.g.,} British Nationality (Hong Kong) Act, 1990, ch. 34, § 1(1) (setting a limit of 50,000 residents of Hong Kong who may be registered as British citizens before 1997); Immigration Act, 1988, ch. 14, §§ 1, 3(1) (amending the Immigration Act, 1971, ch. 77) (eliminating advantages conferred on Commonwealth citizens who were settled in the United Kingdom prior to 1973 and limiting “rights of abode” and the right of appeal to holders of a U.K. passport or certificate of entitlement); British Nationality Act, 1981, ch. 61 (limiting the “right of abode” in the United Kingdom, and replacing citizenship of the United Kingdom and the Colonies with three separate and unequal citizenships: British citizenship, British Dependent Territories citizenship, and British Overseas citizenship). The last named act gave full British citizenship rights only to those whose ancestral connections —“descent in the male line”— were with the United Kingdom and Colonies. \textit{Id.} at § 14. It is no coincidence that the best-known British cases in which the courts have sought to apply “higher law” are in the area of antidiscrimination and immigration. \textit{See, e.g.,} Regina v. Home Secretary \textit{ex parte} Phansopkar, 1 Q.B. 606, 621-23 (C.A. 1976) (holding that delay in granting entry into the country to the Indian wife of a resident of Britain could not be tolerated, taking into account the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221).

\textsuperscript{158} Historians have had a field day with eighteenth- and nineteenth-century Britain, claiming that the legal system existed in large part to intimidate the poor and maintain the privileges of the rich. \textit{See, e.g.,} Douglas Hay et al., \textit{Albion's Fatal Tree: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND} 49-56 (1975) (arguing that the legal system of eighteenth-century England provided both the ideology and the practical mechanism for class subordination); E.P. Thompson, \textit{THE MAKING OF THE ENGLISH WORKING CLASS} 202-03 (1963) (highlighting the grievances felt by working people as a result of capitalist exploitation); E.P. Thompson, \textit{WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT} 206-18 (1975) (arguing that the eighteenth-century introduction of the death penalty for a wide variety of offenses was the product of deep conflict between economic classes). \textit{But cf.} Mitchell C. Stein, \textit{Note, Law and Legitimacy in England, 1800-1832: Bringing Professors Hay and Thompson to the Bargaining
to eradicate through antidiscrimination approaches to judicial review than are caste biases. Judges in England, as in most countries, generally are drawn from socially and financially elite groups. When they are not, they often are quickly co-opted into the elite. Such a culture of the bench may render judges more sensitive than legislators to caste bias. Unlike those a few social rungs ahead of the outcast group, judges may be somewhat more distanced from caste conflict. But the elite outlook of the judiciary may also leave judges insensitive to class and wealth discrimination. Popularly accountable legislators, although less than adequately sensitive, may still prove more effective guardians than the courts for this type of discrimination.

The unfortunate fact remains, however, that in the United States, as in England, neither the courts nor the legislatures have proven very effective at ensuring that the fundamental rights of poor people are not diminished in a discriminatory way. Thus, it appears that in practical terms it will not be sufficient to state, as Professor Ackerman has in conversation, that the next great step in equal protection law

---

159 In England, the Supreme Court of Judicature Act, 1925, 15 & 16 Geo. 5, ch. 49, § 9, establishes a requirement of at least 10 years of practice as a barrister for one to qualify for judicial appointment. See The Dictionary of English Law 1020 (Earl Jowitt & Clifford Walsh eds., 1959). The long-standing social distinction between barristers and other lawyers thus further entrenches the elite composition of the high court bench. It is understandable that the English political left is "deeply suspicious of the judges' narrow, elitist background." Lee, supra note 84, at 785.

Some have pointed out the privileged backgrounds of American judges as well. See, e.g., Terence Moran, Reagan Administration's Legal Legacy, LEGAL TIMES, Oct. 10, 1988, at 5 (reporting on the importance of having "friends in the right places" during the judicial confirmation process); Charley Roberts, Official Defends Reagan Selection of White, Male Judges, L.A. DAILY J., Feb. 3, 1988, at 1 (noting that of President Reagan's 367 judicial nominees, only 1.6% were black and only 8.4% were women).

160 Cf., e.g., E. Lambert Wallace & Donald M. Taylor, Assimilation Versus Multiculturalism: The Views of Urban Americans, 3 SOC. F. 72, 72 (presenting a Detroit-based study finding strong support for multiculturalism and racial diversity among middle-class whites and middle-class blacks, but finding "[t]he working class white American sample . . . distinctive in its rejection of multiculturalism and in its negative attitudes toward other ethnic and racial groups").

161 Several dissenting Justices on the United States Supreme Court have attacked majority decisions for their insensitivity to class differences. For example, in Rust v. Sullivan, 111 S. Ct. 1759 (1991), Justice Blackmun argued that "to hold that the doctor-patient relationship is somehow incomplete where a patient lacks the resources to seek comprehensive health care from a single provider is to ignore the situation of a vast number of Americans." Id. at 1782 n.3 (Blackmun, J., dissenting). Justice Blackmun went on to quote a passage that Justice Marshall had written when dissenting from an opinion written by Justice Blackmun himself: "[It is] perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live." Id. (quoting United States v. Kras, 409 U.S. 434, 460 (1973) (Marshall, J., dissenting)).
will be the finding that certain wealth distributional differences are unconstitutional. Judicial enforcement of such an expansion of equal protection doctrine would almost certainly fail, not for lack of power or the absence of constitutional language on which judges could rely, but for lack of commitment or interest. If we are serious about class and wealth discrimination, we must look beyond our constitutional history and framework and seek new approaches and new institutions to protect the poor against discriminatory treatment.

But why not encourage the courts to exercise Type II protection of the poor, even without expecting judges to be especially effective at it? What is the harm in urging such an additional safeguard? The answer lies in the danger that judicial review of economic legislation will be employed primarily to protect the wealthy.

At times the upper classes have, in fact, been made the scapegoats of populist majorities. It might seem that the courts could play an

162 The United States Supreme Court has failed to act in many cases that involved economic discrimination. See, e.g., Rust, 111 S. Ct. at 1778 (upholding a regulation prohibiting employees of federally funded family planning programs from discussing abortion with their clients); Webster v. Reproductive Health Servs., 492 U.S. 490, 511–13 (1989) (upholding a statute prohibiting publicly funded hospitals and clinics from counseling clients on abortion or performing abortions that are not necessary to save the mother's life); Harris v. McRae, 448 U.S. 297, 316 (1980) (holding that, even when an abortion is medically necessary, the state is not required to provide government funds for abortion because "[t]he financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency"); Maher v. Roe, 432 U.S. 464, 470–71 (1977) (finding that a regulation limiting state benefits for abortions to cases in which abortion was medically necessary did not discriminate against the class of women unable to pay for abortions); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (refusing to find that the economically disadvantaged constitute a suspect class whose equal protection rights are violated by public education financing systems that rely on local property taxation schemes). Some state courts have been more active. See, e.g., Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990) (unanimously holding that New Jersey's school financing scheme violated the state constitution as applied to the state's poor school districts and ordering the legislature to amend the scheme to ensure equal funding for all districts).

163 The classic example of this genre of scapegoatism was Teddy Roosevelt's stump speech attacking the economic power exercised by "malefactors of great wealth." Mr. Roosevelt's Speech at the Laying of the Corner Stone of the Pilgrim Memorial Monument, Provincetown, Massachusetts, Living Age, Sept. 14, 1907, at 691, 692.

The history of debt nullification movements, state infringements of private contracts, and paper money acts provides examples of the populist classes wielding the power of majoritarian politics against the rich. See Patrick T. Conley, Democracy in Decline: Rhode Island's Constitutional Development 1776–1842, at 74–106 (1977) (arguing that the Rhode Island legislature's decision to print large amounts of paper money almost led to a civil war between the pro-paper money majority and the class of wealthier creditors forced to accept devalued bills in payment for debts); Benjamin F. Wright, Jr., The Contract Clause of the Constitution 4–14 (1938) (arguing that the frustration of the rich with populist legislation that favored debtors over creditors prompted the demand for the Contracts Clause). Rhode Island politics during the paper money period came to represent everything the drafters of the Constitution hoped to avoid.
adequate antidiscrimination role in such cases. But courts often prove at least as ill-equipped here as they are in preventing discrimination against the poor. Here, the judge's class links and biases become so obvious that any decision a court makes is bound to raise justifiable suspicion. It is no accident, therefore, that many thoughtful people are reluctant to entrust protection against class bias, either against the rich or against the poor, to the judiciary. Distrust of the courts has led one astute economist, who is concerned with countering bias against the rich, to explore alternatives to judicial authority or legislative majorities to safeguard against populist abuse. Those concerned with discrimination against the poor should be equally inventive.

IV. REINVIGORATING TYPE II AND TYPE III JUDICIAL REVIEW

To this point, the discussion has been a mainly descriptive typology of the four models of judicial review, their underlying normative assumptions, and their applicability in the United States and other countries. Yet it should be clear by now that I have strong views about the role and relative merits of these four models in the United States. Whatever the solution in other countries, I do not believe that in the United States we can effectively protect fundamental rights without substantial judicial involvement. But, although I endorse a role for Type I judicial review, I also suggest limitations for that role.

As I implied earlier, our problems with an aggressive Type I approach date from the New Deal. The New Deal's rewriting of our Constitution offered, in Carolene Products, a resolution of the interplay between the activist state and efforts to protect against discrimination. But this revision never faced the conflicts between the activist state, with its concomitant rise of communal obligations, and individual, libertarian-based rights. The "Old Court" of the Lochner era was

The question remains whether clauses such as the Takings Clause and the Contracts Clause represent a successful constitutional response by the wealthy and, given these clauses, whether the rich need the independent protection given by the more general antidiscrimination principle. But the failure of the Contracts Clause to amount to much of anything despite its powerful language, see U.S. Const. art. I, § 10, suggests that the existence of the specific clauses may not be enough.

164 See, e.g., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 472 (1921) (construing the Clayton Act to permit the enjoinder of a machinist union's secondary boycott and other activities when the union had "merely a sentimental" interest in the outcome of a strike against a printing press manufacturer); see also Felix Frankfurter & Nathan Greene, The Labor Injunction 165-73 (1930) (criticizing Duplex).

165 See James M. Buchanan, The Limits of Liberty 105-06 (1975) (arguing that courts should be strictly confined to the role of enforcing an independently agreed-upon social contract).
declared wrong in its Type I defense of property against one brand of state activism, but what Type I defense could then logically be offered to protect life and liberty against another brand of statists? What is the difference — former Judge Bork, Chief Justice Rehnquist, and Justice White might ask — between Chief Justice Warren or Justice Brennan and the "Old Court" except that, with no special historical justification, the two groups would accord Type I protection to a different set of rights?166

Long before Bork and Brennan took up arms in this controversy, Justice Black saw the New Deal dilemma and sought to resolve it in originalism. Aggressive Type I protection adheres, he argued, to the first eight amendments, applied to the states as well as to the federal government, to anything else that can be linked to specific constitutional language and to nothing, nothing else.167 But even as fertile and aggressive an expounder of language-based rights as he ultimately found this solution inadequate. He was reluctantly forced to dissent in Griswold v. Connecticut,168 and he clamorously, though happily, violated his Type I principles in Bolling v. Sharpe.169

Using a broader and more sophisticated definition of the interests that require Type I protection may seem to help safeguard rights, but

166 See supra notes 16–18 and accompanying text; cf. Brennan, supra note 19, at 436 ("The view that all matters of substantive policy should be resolved through the majoritarian process . . . ultimately will not do.").

167 Justice Black believed it was the Court’s duty to enforce certain rights regardless of whether legislatures acted hastily, by delegation, or in a discriminatory way. He limited those rights, though, to ones he thought explicit in the language of the Constitution, especially the first eight amendments. See Adamson v. California, 332 U.S. 46, 69–70 (1947) (Black, J., dissenting), overruled by Malloy v. Hogan, 378 U.S. 1, 6 (1964). Most of these rights concerned the creation and preservation of democratic institutions, institutions to which the protection of other rights was entrusted. Not all of Justice Black’s Type I rights, however, fit this description. The right to be free from cruel and unusual punishment and to be free from double jeopardy are not simply “structural rights” designed to make democracy work: they are substantive libertarian rights that, according to Justice Black, the Constitution explicitly placed beyond ordinary majoritarian control.

168 See Griswold v. Connecticut, 381 U.S. 479, 507–09 (1965) (Black, J., dissenting) (expressing strong distaste for a law forbidding the use of contraceptives among married adults, but nevertheless finding no constitutional right to privacy that might invalidate the law).

169 347 U.S. 497 (1954). For a discussion of Bolling, see note 118. When I questioned Justice Black on how he could justify his support for the majority opinion in Bolling despite its blatant violation of his own judicial philosophy, he responded as follows: a wise judge chooses, among plausible constitutional philosophies, one that will generally allow him to reach results he can believe in — a judge who does not to some extent tailor his judicial philosophy to his beliefs inevitably becomes badly frustrated and angry. (Justice Black may have been thinking of Justice Robert Jackson, whose basic constitutional philosophy fit more comfortably with the political views of his law clerk, William Rehnquist, than with his own.) A judge who does not decide some cases, from time to time, differently from the way he would wish, because the philosophy he has adopted requires it, is not a judge. But a judge who refuses ever to stray from his judicial philosophy, and be subject to criticism for doing so, no matter how important the issue involved, is a fool.
at a cost. The looser the link to language, original structure, and intent, the greater the danger of judicial imposition of elite values. The more judges and philosophers are left to define for themselves the areas forbidden even to the post-New Deal state, the greater the danger that they will impose their own libertarian (or communitarian) values on a polity that has failed to specify at a constitutional level just how far the activist state can go.

Justice Frankfurter also saw the problem and pursued a solution diametrically opposed to that proposed by Justice Black. For him, Type I protection could apply to any possible rights, whether originalist, enumerated, or newly minted. But courts had to be extremely restrained and only use their Type I powers in the most extreme cases. In his celebrated Holmes Lectures at the Harvard Law School, Professor Bickel ruefully reviewed the failure of both Justice Black’s and Justice Frankfurter’s attempts to limit courts and noted that any definition of fundamental right, whether as broad as Justice Frankfurter’s or as narrow as Justice Black’s, will have flaws and will easily break down. Such definitions of rights cannot make U.S. courts exercise the needed self-restraint unless the courts are given other means by which to deal with repeated systemic legislative abuses of what judges — and like-minded philosophers and scholars — perceive to be fundamental rights, even if the rights are highly controversial. Courts can restrain themselves in the face of single, chance abuses of rights they deem fundamental; it is unrealistic and perhaps wrong to expect the same of them when the abuses are frequent and systematic. Systematic abuse suggests that either the judge’s defi-


171 See BICKEL, supra note 6, at 86–90 (exploring the weaknesses in Justice Black’s language-based approach to the Bill of Rights); BICKEL, THE SUPREME COURT AND PROGRESS, supra note 68, at 34 (stating that Frankfurter “never successfully identified sources from which [the judgment of the Court] was to be drawn”).

172 Various Justices on the current Court have professed their passive and restrained philosophy. Nonetheless, the Court has shown no more restraint in the face of what it regards as systemic abuses than did previous Courts. This Court differs from the Warren Court principally with respect to the areas in which it finds such abuses. But that is not a matter of approach to law, but only of ideology. A single example will illustrate this point. The disfavor with which the Court views products liability suits is, of course, a political view, and such a view may explain the Court’s decision in Boyle v. United Tech. Corp., 487 U.S. 500 (1988). The Court held that a federal common law, supposed not to exist, overruled the laws of the states and immunized those who had contracted with the government from products liability claims, notwithstanding Congress’s failure to grant such immunity. See id. at 512. Although a political view may explain the result, it cannot justify the opinion’s bad law and worse economics or make the result any less activist or aggressive in either its anti-federalist or anti-states-rights result. This is not to say that there may not be good reason for legislatures to restrain the recent proliferation of products liability suits. See, e.g., George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J. 1521, 1525 (1987) (arguing that expanded tort liability leads to an erosion of insurance coverage). The current administration also links
nition of fundamental rights is wrong or the legislature is systemati-
ically wrong.

I believe such abuses can be prevented only by returning to ex-
pansive and systematic judicial enforcement of the antidiscrimination
principle and constitutional accountability, Type II and Type III pow-
er respectively. The central claim of this Foreword is that Type II
and Type III powers have been too long ignored or used in only a
haphazard way.

There are two ways of restoring Type II and III judicial review
to a major role in a Constitution that also requires some Type I
protection of rights. The first, which I do not favor, requires that
Type II and III review, if applicable, always take precedence over
Type I review. Thus, judges evaluating legislative, executive, or
administrative action should always first check to see if either discri-
nimation (Type II) or rights-implicating haste or hiding (Type III) is
present and, if so, invalidate the action on those grounds alone. Only
if no such legislative pathologies are present or if they were present
but the legislature corrected them — by either repassing a nondiscriminatory version of the law (Type II) or by passing the same law
deliberately and openly (Type III) — should the court resort to Type
I review. Finally, to the extent that Type II and Type III review
have, through their opportunity for a second look, ensured that gov-
ernment action is nondiscriminatory and constitutionally accountable,
Type I review can — and should — be more deferential than it would
otherwise be. In other words, we should expect Type I judicial action
intended to protect a fundamental right to be justified by a particularly
strong reason if Type II and Type III review have first been faithfully
employed.

This approach has the great advantage of neatness and simplicity,
but it is insufficiently protective of rights that, even after the New
Deal, remain clearly central to our constitutional framework. It ul-
ternately rests on a dubious skepticism about the degree of consensus
that exists in the United States over the parameters of Type I review.
It fears that if any kind of Type I review is allowed to trump Type
II or III review, judges will tend to use Type I as many do now
whenever they have a majority to support it,173 and relegate Type II

173 See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580 (1985) (Rehn-
quist, J., dissenting) (predicting that the majority opinion overruling the established interpre-
tation of the Commerce Clause will itself be overturned in time by a new Court majority); see
also William Rehnquist, Remarks at the Fourth Circuit Judicial Conference (June 28, 1991)
(transcript on file at the Harvard Law School Library) (arguing that if “the Supreme Court as
currently constituted views, after mature deliberation, a particular decision as being wrong,” it
should be “free to change it”).
THE SUPREME COURT — FOREWORD

or III review to ad hoc use in cases in which the Court could not make up its mind. Such a judicial attitude would necessarily undermine the value of Type II and III review as principled approaches to judicial review. It would lessen the effectiveness of these approaches as restraints on those with an overly broad conception of Type I review and as bases for action for those who, fearful of imposing their own values on the majority, now resort to an overly narrow conception of Type I.

But there does exist in our polity a degree of consensus over the propriety of Type I protection for certain categories of rights. Despite the New Deal, the centrality of these categories remains an undisputed part of our constitutional tradition; such categories at least include most of the enumerated rights and even some structural rights.174 To treat even these rights as subject to legislative reconsideration inevitably and unintentionally begins an erosion of these rights that is neither justified nor desirable. And the erosion proceeds even if the legislature confirms the validity of the rights on remand. What is more, some structural rights require Type I protection because without them no executive and legislature that we would trust to exercise a valid second look can exist.175 As to these rights, a remand rather than a direct assertion of the structural requirement makes no sense at all.

Thus, a better approach would occasionally allow Type I review to take precedence in cases involving a limited but important set of rights. Of course, this approach risks allowing activist judges to expand Type I protection until it approaches Justice Brennan’s and the old New Deal Court’s use of it. The risk can be contained, however, as long as courts appreciate the dangers of judicial autocracy inherent in overbroad uses of Type I protection and recognize the efficacy of protection afforded at less risk by Type II and III review. If Type II and III are truly given their due, I would feel comfortable limiting Type I to aggressively interpreted enumerated rights and to those structural rights that have been recognized as an essential part of our Constitution from the very beginning or have been clearly and properly adopted in a genuine constitutional moment. I would avoid the application of Type I protections to even such popular, open-

174 See supra notes 93–98 and accompanying text. None of this is to say that we cannot still argue about the parameters of such rights. Similarly, we can debate the degree to which judges should be expansive in applying Type I protection to these rights. How broad or how narrow should they be? Here Justices Black and Stewart, who would probably have accepted similar definitions of the rights subject to Type I review, would certainly part company.

175 The right to a regime of one person, one vote comes readily to mind. But cf. Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 735 (1964) (invalidating a departure from the one-man, one-vote standard even though the new measure had been approved by a popular referendum in which each voter counted equally).
ended concepts as the "right to privacy."\textsuperscript{176} And this is so although, were I to choose, I would prefer many of Justice Brennan's results to those of Judge Bork.

If judges are power-hungry scoundrels, of course, neither my definition of judicial power nor any other will work. If instead, as Bickel suggested, definitions of rights and judicial restraint break down in the face of systemic violations of the rights judges hold dear, the availability, use, and effectiveness of Type II and Type III review in protecting rights should suffice to elevate those theories of Type I review that are less open-ended than that espoused by Justice Brennan.

Conversely, one can hope that judges who have no sympathy with the alleged rights will nevertheless support a second look when a strong argument has been made that a violation of a potentially significant, non-enumerated right occurred in a hidden or hasty way, or, just as important, that the violation has been enacted because the burden falls primarily on outsiders. Requiring a second look would not in these circumstances amount to imposing the judge's elite moral values on the polity — Judge Bork's and Justice Black's oft-expressed reason to fear judges. In reality the only values imposed are constitutionally grounded ones that bar discrimination and require the legislature to speak openly and thoughtfully when rights are at stake. To the extent that "anti-rights" judges fail to require a second look, they will no longer be able to hide behind a false populism or majoritarianism. They will be exposed as willful statists or classic bigots.

In the end, however, both forms of restraint depend on the plausibility of two propositions: that absent hiding, haste, and discrimination, legislatures will adequately protect rights, and that the danger of having courts exercise Type II and Type III powers is less than the danger of not having them do so. The question remains: why are judges better and less dangerous than legislatures at detecting and avoiding discrimination or haste and hiding if they are not necessarily better and less dangerous at detecting and avoiding violations of fundamental rights generally? There are at least three answers, two of which I have already discussed.

First, the inquiries involved in Type II and Type III adjudication have an objective quality that is absent in non-enumerated, non-originalist Type I adjudication. For Type II, the inquiry is the identification of historically excluded groups; for Type III, it is the identification of haste or hiding. Second and more importantly, legislatures are uniquely inept at identifying instances in which they have burdened only those to whom they need not answer (Type II), and at

\textsuperscript{176} For a case applying such a right, see, for example, Griswold v. Connecticut, 381 U.S. 479, 485 (1965). As I have repeatedly suggested throughout this Foreword, however, laws such as those in question in cases like Roe v. Wade, 410 U.S. 113 (1973), and Griswold often deserve Type II or Type III scrutiny.
correcting their refusals to be held constitutionally accountable (Type III). Third, legislatures' ability to reenact similar laws that are not the product of discrimination or of haste and hiding minimizes the dangers of allowing judges to make Type II and Type III decisions. If a statute is struck down on Type III review, the legislature may pass the very same provision as long as it is reenacted deliberately and openly. Similarly, legislatures can choose to make universal the burdens imposed by any government action struck down under Type II review. Thus, a court enforcing a judge's finding of discrimination or haste or hiding does not deprive the legislature of the last word.

If legislatures choose not to assert the last word, as I believe will often be the case, so be it. Legislative acquiescence would merely highlight the instances in which judges were better than legislatures at protecting penumbral or newly minted rights. If the legislature instead reenacts the law, and places the burden on all of us deliberately and openly, I may or may not agree with the result, but I will at least know that society does not rate as fundamental what the judge (and perhaps I) deemed to be crucial. A valid second look will have occurred. In a mini-Ackerman sense, "The People" will have spoken. And in a democracy, when one is dealing with "judge-found" rights, that is no small thing.

V. THE REHNQUIST COURT'S FAILURES

The Rehnquist Court can be criticized for aggressively using Type I jurisprudence to define new rights and to resurrect old ones. It has employed Type I review to protect "rights" that are hardly enumerated and to reaffirm enumerated rights in cases in which they have long been deemed not to apply. It can be even more
severely criticized for its failure to accord full Type I protection to rights admitted to be "enumerated" and to be relevant to the case. It must also be criticized for the particular way it has, especially last Term, systematically undermined its role as guarantor of procedural due process in criminal cases. It would be worrisome enough if it had passively begun to relax or reverse the oversight that Supreme Courts of different outlooks and compositions had slowly, over the decades, come to treat as essential. But the dramatic, non-incremental, and aggressive way in which the Court has relinquished oversight — by reaching out for cases, by deciding issues well

181 See, e.g., Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2460, 2463 (1991) (finding that nude dancing implicated the First Amendment, albeit only "marginally," but that the public interest in banning the conduct outweighed any First Amendment interest in the conduct's expressive content); id. at 2468–69 (Souter, J., concurring in the judgment) (agreeing that nude dancing is subject to First Amendment protection but allowing regulation because of the state's interest in preventing the secondary effects of adult entertainment establishments); Maryland v. Craig, 110 S. Ct. 3157, 3165–67 (1990) (holding that a state's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh a defendant's enumerated right to confront his accusers in court); cf. Texas v. Johnson, 491 U.S. 397, 431–35 (1989) (Rehnquist, C.J., dissenting) (arguing that, although flag burning implicates the First Amendment, a Texas statute prohibiting flag desecration is not unconstitutional). But cf. Barnes, 111 S. Ct. at 2465 (Scalia, J., concurring) (concluding that the First Amendment does not apply and that the statute prohibiting nude dancing should be upheld on the ground that moral opposition to the activity supplies a rational basis for its prohibition).

182 In Arizona v. Fulminante, 111 S. Ct. 1246 (1991), the Court sought to overrule a clear line of precedent dating back at least to Malinski v. New York, 324 U.S. 401 (1945), which held that, when a coerced confession has been admitted into evidence, a conviction will be set aside even though the evidence apart from the coerced confession might have been sufficient to sustain the jury's verdict. See Fulminante, 111 S. Ct. at 1264–65; Malinski, 324 U.S. at 404. Two other cases severely curtailed the availability of habeas corpus review in federal courts, a right solidified as early as 1953. See Brown v. Allen, 344 U.S. 443, 545–48 (1953) (Jackson, J., concurring). In one of these cases, Coleman v. Thompson, 489 U.S. 255 (1989), the Court reinterpreted Harris v. Reed, 489 U.S. 255 (1989), to require that federal law be plainly involved in a state court decision in order to reach the "plain statement" test. See Coleman, 111 S. Ct. at 2557–59. The Court further determined that a procedural default in the state courts is a sufficient state ground to deny habeas review of the state conviction. See id. at 2565. In the other case eroding federal habeas review, McCleskey v. Zant, 481 U.S. 279 (1987), the Court held that the abuse of the writ doctrine does not require a showing of deliberate abandonment of a ground of appeal by the petitioner in a first petition in order to bar subsequent habeas review. See id. at 1470–71.

183 In Payne v. Tennessee, 111 S. Ct. 2597 (1991), the Court chose to grant certiorari even though the lower court ruled that any constitutional error "that might have occurred was harmless beyond a reasonable doubt." Payne v. Tennessee, 111 S. Ct. 1031 (1991) (mem.) (Stevens, J., dissenting from the Court's grant of certiorari); see also Payne, 111 S. Ct. at 2631 (Stevens, J., dissenting) (reiterating his objection to reaching the constitutional issue). Justice Marshall similarly objected to the majority's decision to overrule two predecessors concerning a question addressed by neither the state courts nor the petition for certiorari. See id. at 2619 (Marshall, J., dissenting); see also McCleskey, 111 S. Ct. at 1477 (Marshall, J., dissenting) (criticizing the Court for overruling Sanders v. United States, 373 U.S. 1 (1963), when such action "was not even requested by respondent at any point in this litigation" (emphasis in original)).
beyond the case before it,\textsuperscript{184} by unnecessarily applying its rulings retroactively,\textsuperscript{185} and by pursuing extra-judicial lobbying\textsuperscript{186} — be-speaks a willfulness that is unseemly, injudicious, and dangerous.\textsuperscript{187}

The Rehnquist Court has a right to believe that previous Courts developed too many procedural safeguards. It has a right to favor capital punishment, even if previous Courts came to the edge of declaring it unconstitutional.\textsuperscript{188} But the Court's desire to see people

\textsuperscript{184} In 	extit{Fulminante}, the Court held that coerced confessions could be harmless error, despite the fact that at least five Justices found that the confession at issue was 	extit{harmful}. See 	extit{Fulminante}, 111 S. Ct. at 1257. The issue of harmless error need not have been decided.

\textsuperscript{185} In 	extit{McCleskey}, the Court changed the rules governing abuse of process in habeas cases and applied the new standards to bar a petition in a capital punishment case. See 	extit{McCleskey}, 111 S. Ct. at 1470–75. Justice Marshall attacked this approach in dissent and said, "The Court's utter indifference to the injustice of retroactively applying its new, strict-liability standard to this habeas petitioner stands in marked contrast to this Court's eagerness to protect States from the unfair surprise of 'new rules' that enforce the constitutional rights of citizens charged with criminal wrongdoing." Id. at 1485 (Marshall, J., dissenting).

\textsuperscript{186} Extra-judicial lobbying is not problematic per se, but implementing judicially what one is unwilling to wait for the legislature to do is unacceptable. In his dissent in 	extit{McCleskey}, Justice Marshall stated, "Confirmation that the majority today exercises legislative power not properly belonging to this Court is supplied by Congress' own recent consideration and rejection of an amendment to § 2244(b)," which would have limited the right to habeas appeals. Id. at 1482 (referring to 28 U.S.C. § 2244, which allows some judicial discretion in entertaining applications for habeas corpus review). Justice Marshall continued: "[T]his Court does not function as a backup legislature for the reconsideration of failed attempts to amend existing statutes." Id. Chief Justice Rehnquist had earlier lobbied Congress directly for amendment of § 2244(b). See Linda Greenhouse, 	extit{Rehnquist Renews Request to Senate}, N.Y. TIMES, Oct. 13, 1989, at A21 (reporting that Chief Justice Rehnquist had sent a letter to Senator Joseph Biden urging Congress to act on a proposal Chief Justice Rehnquist had initiated for speeding federal court review of death sentences).

\textsuperscript{187} The Rehnquist Court has overturned time-honored Supreme Court practices in other areas as well, most notably in its treatment of precedent. For instance, in 	extit{Payne}, Chief Justice Rehnquist articulated a novel theory of precedential value that declined to require the "extraordinary showing that this Court has historically demanded before overruling one of its precedents." 	extit{Payne}, 111 S. Ct. at 2621 (Marshall, J., dissenting). Instead, Chief Justice Rehnquist treated cases decided by "the narrowest of margins" and "over spirited dissents" as ripe for reconsideration. 	extit{Payne}, 111 S. Ct. at 2611. Further, Chief Justice Rehnquist argued that although "[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved, the opposite is true in cases . . . involving procedural and evidentiary rules," Id. at 2610 (citations omitted). The members of the Court's conservative majority do not all subscribe to this theory. Justices Kennedy and Souter both continue to believe a "special justification" necessary to depart from precedent. Id. at 2618 (Souter, J., joined by Kennedy, J., concurring) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)). Justices Kennedy and Souter, however, joined in the decision in 	extit{Harmelin} v. Michigan, 111 S. Ct. 2680 (1991), which severely limited a 5–4 ruling in 	extit{Solem} v. Helm, 463 U.S. 277 (1983), and circumscribed proportionality review of sentences under the Eighth Amendment. See 	extit{Harmelin}, 111 S. Ct. at 2696–97.

\textsuperscript{188} See 	extit{Furman} v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (holding that the death penalty as applied in the cases at issue was unconstitutional). In separate concurring opinions, Justices Brennan and Marshall found the death penalty categorically impermissible under the Eighth and Fourteenth Amendments. See id. at 305 (Brennan, J., concurring); id. at 370–71.
whom it deems guilty\textsuperscript{189} executed, and quickly, does not give the Court the right to dismantle, in one Term or so, what earlier Courts had built up over many decades. The criticism should be especially severe because, in contrast to the Warren Court, which at times showed a similar willfulness and was criticized for it,\textsuperscript{190} this Court falsely declares itself to be dedicated to judicial restraint.\textsuperscript{191}

Still, for all the validity of these criticisms, no failures of the Rehnquist Court are more important than its reluctance to use Type II and Type III approaches — which were often clearly available to test for nondiscriminatory majoritarian support for a law — coupled with the Court’s failure to protect the plausible rights asserted in such cases, allegedly because according the rights Type I protection would be anti-majoritarian. Such judicial behavior reflects either woeful ignorance or a willful “statist” desire to negate the alleged rights regardless of their true majoritarian support. Because members of the current Court have made arguments reflecting Type II or III jurisprudence when it has suited them,\textsuperscript{192} ignorance of the doctrines seems

\begin{footnotesize}
\begin{enumerate}
\item For example, the Court maintains an exception to its formalistic habeas rules for cases in which the prisoner is “actually innocent.” In Coleman v. Thompson, 111 S. Ct. 2546 (1991), Justice O’Connor “reaffirmed” that “a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice.” \textit{Id.} at 2564. The Court held that this standard would be met in those cases in which “a constitutional violation has probably resulted in the conviction of one who is actually innocent.” \textit{Id.} (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)). But how will the court know when someone is “actually innocent”? The presumption that they will “just know it when they see it” is the height of willful foolishness.
\item See, e.g., \textit{Rust v. Sullivan}, 505 U.S. 17, 846-856 (1998) (O’Connor, J., dissenting) (invoking “our time-honored practice of not reaching constitutional questions unnecessarily”); \textit{Thompson v. Oklahoma}, 487 U.S. 815, 857-858 (1988) (O’Connor, J., concurring in the judgment) (reiterating the “familiar principle” that “we should avoid unnecessary, or unnecessarily broad, constitutional adjudication in order to avoid deciding whether the death penalty was constitutional when imposed on a felon who was 15 years old at the time of his crime”).
\end{enumerate}
\end{footnotesize}
less likely than an aggressive desire to negate rights whether or not the representatives of "The People," if given the chance, would choose to affirm the rights at stake. To illustrate my point, I discuss a few cases in which Type III remands were appropriate and not used. I then turn to the Court's failures with respect to Type II review, the enforcement of the antidiscrimination principle.

_Rust v. Sullivan_193 is a dramatic example of the willful rejection of an alleged right. A Type III remand would have been an appropriate way of seeing whether "The People" or their representatives wanted the possible right to be questioned. A bureaucrat read a federal law — admitted by the Court to be unclear on the issue194 — to prohibit doctors working in partially federally funded clinics from discussing abortion, even as a possibility, with their patients. The regulation necessarily raised serious First Amendment questions. Many would say the case so clearly implicates free expression that Type I protection was unquestionably appropriate. Others would argue that when federal funds are involved, the First Amendment question is sufficiently attenuated that Type I protection is not necessarily called for (although they would admit that federal funding does not in itself mean that the First Amendment and Type I protection may not be appropriately involved).195

Under the circumstances, the obvious answer would seem to be to read the statute to avoid the issue and let the legislature decide whether it really wished to enact a rule that might infringe on a fundamental right. Only then would the Court need to decide whether a Type I right was, in fact, involved. This approach is vintage Bickel. It might even have been Bickellian if the law clearly delegated the power to make this kind of regulation to the bureaucrat (for then the undue delegation doctrine would have been an appropriate way of creating a Type III remand). But a remand is certainly appropriate when the law is accepted by all to be so unclear196 that it can be fairly read to avoid the constitutional problems.

Ignorance cannot explain the Court's failure to read the law this way, for Justice O'Connor pointed out the Type III solution in her dissent.197 Although one can only speculate about the Court's reason, the speculation is not far fetched. The Chief Justice, who wrote for

---

194 See id. at 1767.
195 Chief Justice Rehnquist's opinion specifically exempted from his _Rust_ holding federally funded or supported universities, because he considered them "traditional sphere[s] of free expression . . . fundamental to the functioning of our society." _Id._ at 1776.
196 See id. at 1767 (agreeing "with every court to have addressed the issue that the language of the statute is ambiguous").
197 See _id._ at 1788–89 (O'Connor, J., dissenting).
the Court in *Rust*, has missed no occasion to further his statist, anti-rights view of the First Amendment or to create and expand doctrines that weaken the amendment's scope.\(^{198}\) For him, *Rust* was a great opportunity. Justices such as Justice Scalia, who are normally reluctant to limit speech, were blinded in *Rust* by the fact that the speech in question dealt with abortions. Their willful desire to do anything to cast doubt on *Roe v. Wade* — even though that case was not in issue in *Rust* — gave the Chief Justice his chance. The fact that no representative of the people had ever decided to try to limit speech, that no majoritarian requirement that a putative right be limited was involved, did not matter. The case stands not as a decision about abortion, which is legally speaking irrelevant to it,\(^{199}\) nor as an illustration of a Court yielding to majority wishes, but as a prime example of result-oriented judicial activism, equal to any excess for which the Warren Court was attacked.\(^{200}\)

The *United States v. Monsanto*\(^{201}\) decision from an earlier Term represents another paradigm missed opportunity for Type III review. The case involved a statute that provided for the seizure of the assets of a defendant charged with certain offenses, such as drug dealing, when the assets apparently derived from the alleged criminal activity.\(^{202}\) The prosecutors had invoked the statute to freeze funds the defendant intended to use to pay for his defense lawyer’s fees.\(^{203}\)


\(^{199}\) The government presumably could not pass a law banning abortion-related speech, at least not when abortions are legal. Still, it is worth emphasizing that what the Court has done in *Rust* is to allow the government to bar the provision of information regarding an activity that was at the time not merely legal but also, whatever the Court believes should ultimately happen, still a constitutional right.

\(^{200}\) Nor was this the only case last Term that was ripe for some kind of Type III review. See, e.g., Florida v. Bostick, 111 S. Ct. 2382, 2387–88 (1991) (holding that the Fourth Amendment permits the police to board buses in order to question passengers and request permission to search their luggage); Wilson v. Seiter, 111 S. Ct. 2321, 2326–27 (1991) (deciding that a prisoner raising an Eighth Amendment challenge to the conditions of his confinement must show a culpable state of mind on the part of prison officials); County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1670 (1991) (extending the time a detainee arrested without warrant may be held prior to a judicial determination of probable cause). Type III review could have been appropriate, because in each case, the official conduct in question implicated a fundamental right, and yet no majoritarian body had openly, recently, and deliberately authorized the conduct.

\(^{201}\) 491 U.S. 600 (1989).

\(^{202}\) See id. at 602–03.

\(^{203}\) See id. at 603–04.
Writing for the majority, Justice White made the staggering statement that Congress never considered the application of the statute to pre-trial orders freezing funds that were earmarked for private defense lawyers. Justice White argued that, because Congress never specifically considered the application of the statute to funds earmarked for other purposes—such as payment of stockbroker fees or laundry bills—Congress's silence could not cut against the government. The Court's failure to distinguish between a requirement of clear congressional intent when a government action implicates a fundamental right—here the right to choose one's own counsel—and when the action patently does not is mind boggling. Such reasoning displays either a complete ignorance of constitutional law and doctrine or a blatantly political desire to get drug dealers at any cost to our constitutional framework. Someone not so ideologically driven—Bickel from his grave—might well ask: what is to be lost by seeing if Congress really meant to limit criminal defendants, yes, even alleged drug dealers, in their choice of counsel? If it did, perhaps it would be a valid legislative judgment, but the initial policy choice is one for Congress, not for the courts.

The same analysis applies to another recent set of disastrous Supreme Court opinions: those upholding capital punishment of minors.

204 See id. at 608 n.8.
205 See id. at 608–09.
206 The Sixth Amendment guarantees “effective” assistance of counsel to all state and federal criminal defendants facing felony charges. See McMann v. Richardson, 397 U.S. 759, 771 (1970) (“[D]efendants facing felony charges are entitled to the effective assistance of competent counsel.”); cf. Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide counsel for indigent felony defendants). The right to effective assistance of counsel has long been understood to be a “fundamental” right. See, e.g., McQueen v. Svenson, 498 F.2d 207, 213 (8th Cir. 1974).
207 Professor Bickel has argued that an intent to violate constitutional rights or make dramatic changes in our federal structures should not be imputed to Congress in the absence of clear language and legislative history. See generally BICKEL, supra note 6, at 150–52, 157–59, 165–66. This principle requires interpreting statutes on the assumption that they were not intended to infringe on constitutionally protected areas. Justice O'Connor provided a fine example of such interpretation in her opinion in Rust v. Sullivan, 111 S. Ct. 1759 (1991), when she declared: It is enough in this case to conclude that neither the language nor the history of [the statute] compels the Secretary's interpretation [as expressed in the disputed regulation], and that the interpretation raises serious First Amendment concerns. On this basis alone, I would reverse the judgment of the Court of Appeals and invalidate the challenged regulations.
Id. at 1789 (O’Connor, J., dissenting). Similar reasoning can be found in other cases. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); see also Barenblatt v. United States, 360 U.S. 109, 139–40 (1959) (Black, J., dissenting) (“[M]ore is required of legislatures than a vague delegation . . . .” When Congress “reach[es] to the very fringes of [its] power,” “it must be prepared to say so expressly and unequivocally.”).
and the retarded. In these cases, the Court counted state laws to
determine whether a consensus against such punishments existed.\footnote{208}{See, e.g., Stanford v. Kentucky, 492 U.S. 361, 371 (1989) (finding that "a majority of
the States that permit capital punishment authorize it for crimes committed at age 16 or above"); see also supra note 108 (discussing the death penalty cases); infra note 210 (same).}
Quite apart from the questionable validity of that approach to deter-
mining whether a punishment is cruel and unusual,\footnote{209}{See Stanford, 492 U.S. at 383 (Brennan, J., dissenting) (disputing the majority's method
of assessing whether a punishment is cruel and unusual); Thompson v. Oklahoma, 487 U.S. 815, 869-72 (1988) (Scalia, J., dissenting) (arguing that there is no rational basis for viewing a
drop in the total number of executions of minors under age 16 as indicative of a national
consensus on whether such executions are cruel and unusual); cf. Harmelin v. Michigan, 111 S. Ct. 2680, 2699, 2701 (1991) (holding that a mandatory life term for drug possession is not cruel
and unusual punishment even though such harsh sentences are not accepted in other states).}
the Court utterly failed to consider that many of the states that nominally per-
mitted such punishments had not tried to execute minors or retarded
people, or even focused on the issue recently, if ever.\footnote{210}{In upholding the death penalty for minors, Justice Scalia pointed out that 25 of 37 states
authorizing capital punishment had procedures by which 17-year-olds could face the
dead penalty, and 22 of those 37 states had procedures by which 16-year-olds could face death. See Stanford, 492 U.S. at 370. He concluded that there is no consensus with respect to treating
minors differently from adults for purposes of capital punishment. See id. at 371.
Dissenting, Justice Brennan argued that Justice Scalia's counting of states to determine
consensus failed even on its own terms: the 14 states that have no death penalty are presumably
just as, if not more, opposed to executing minors as they are to executing anyone else — which
would give a tally of 27 to 23 against executing minors. See id. at 385 (Brennan, J., dissenting).
Furthermore, Justice Brennan questioned the majority's presumption that a state that authorizes
capital punishment and also has judicial procedures for certain minors to be tried as adults has
unequivocally sanctioned the execution of minors. Justice Brennan claimed that 19 of the 22
states that could theoretically execute 16-year-olds had not yet "squarely faced the question." Id. at 385. In other words, only three of the 50 state legislatures have explicitly
authorized death for 16-year-olds. In fact, some states hastened to change the laws when minors were
condemned to death. The Stanford decision is especially troubling in view of the Court's quite
appropriate use of Type III jurisprudence in a similar case involving the executions of minors
under age 16. See Thompson, 487 U.S. at 833-38.}

\footnote{211}{See BICKEL, supra note 6, at 129 ("[I]t is no small matter, in Professor Black's term, to
'legitimate' a legislative measure. The Court's prestige . . . enable[s] it to entrench and solidify
measures that may have been tentative . . . . [I]t can generate consent and may impart
permanence."); CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT: JUDICIAL
REVIEW IN A DEMOCRACY 52-53 (1960) (arguing that, when the Supreme Court reviews and fails to strike
down a statute, it legitimates the statute).}

\footnote{212}{See, e.g., AMNESTY INTERNATIONAL PUBLICATIONS, USA: THE DEATH PENALTY: DE-
VELOPMENTS IN 1987, at 1-3, 41-43 (1988) (discussing the worldwide repeal of death penalties
and the existence of international agreements recognizing the goal of eliminating capital punish-
ment). According to Amnesty International, "all the European Community Member states,
either have abolished, or no longer apply the death penalty." Id. at 42.}
approach, once again, bespeaks either ignorance or an activist desire to impose such penalties, regardless of what the majority wishes.

Perhaps one may understand the fear that the present Court's majority feels toward former Justice Brennan's open-ended view of rights. However, one must deem either extraordinarily ignorant or radically retrograde the Court's utter lack of attention to the judicial roles defined by such traditionalists as Alexander Bickel and Felix Frankfurter, and derived from Chief Justice Hughes, Justice Brandeis, and others long before.

Bickellian second-look doctrines are designed to make legislatures and executives accountable, to make them responsive to the people. Failure to use the doctrines reflects a presumably ideologically based desire on the part of the Court to encourage laws that may infringe on nontextual fundamental rights, rather than the Court's oft-spoken assertion that it only wishes to let majoritarian bodies have their way. The Court allows violations of rights that "The People" have not determined to allow. As such, the Court's behavior is as virulently anti-majoritarian as that which it decries.

An analogous argument can be made concerning the Court's failure to use Type II antidiscrimination doctrines, although there its failure is somewhat less patent and more complex. Actually, the Court's decision last Term in Hernandez v. New York was a patent failure. The Court held that the use of peremptory challenges to dismiss bilingual Latino jurors during voir dire did not violate the Equal Protection Clause. Nonetheless, as my discussion of abortion throughout this Foreword suggests, the most obvious refusal to consider Type II approaches can be seen in the various cases in which the Rehnquist Court has sought to limit or undermine Roe v. Wade.


214 See, e.g., Jeffrey Stempel, The Rehnquist Court, Statutory Interpretation, Inertial Burdens, and a Misleading Version of Democracy, 22 U. TOL. L. REV. 583, 608 (1991) (criticizing the Court for placing additional burdens on plaintiffs in civil rights cases and for disingenuously minimizing the ease of majoritarian reversals of such decisions); sources cited supra note 191.


216 See id. at 1867.

217 One other case that could be seen as a failure to deploy Type II review last Term is Powers v. Ohio, 111 S. Ct. 1364 (1991), in which the Court invalidated a prosecutor's use of peremptory challenges to exclude a black juror in a case with a white defendant. See id. at 1370. Invoking the Equal Protection Clause, the Court rested its decision only on Type I grounds, ignoring antidiscrimination grounds. See id. The Court skirted possible Type II grounds for its decision when it admitted that the exclusion of jurors based solely on race is stigmatizing, but failed to distinguish the sort of stigma that attaches to blacks, an outcast group, from the much less worrying kind of stigma that may attach to whites. See id.
Roe v. Wade can be viewed as a case according Type I protection to an unenumerated, judge-found right, grounded in libertarian philosophy—a right that can be described either in terms of privacy or in terms of ownership of one's own body. The dissent and an increasing number of Rehnquist Court Justices have challenged this basis for the decision by saying that it has no constitutional foundation. These Justices have asked why the legislatures should not be permitted to favor communal (good samaritan) values such as fetal lifesaving instead of a right to choose to have an abortion. Long ago a friend put it to me rather brutally in this way: if a state can order someone to refrain from chopping down something as trivial as a tree, why can it not order someone to refrain from destroying a fetus?

To the follower of Type II jurisprudence the answer is obvious: because the burden of preserving trees falls in a nondiscriminatory way on all of us, while the burden of fetal lifesaving falls solely on women. Yes, it falls only on women who engage in sex—voluntarily or not. But that response does not address the Type II problem: the burden does not fall on men who do the same thing. As a result, sexual conduct is burdened by anti-abortion laws in a way that treats men and women differently. Does that disparate treatment make such laws invalid under an antidiscrimination approach?

The answer depends on many factors. First: Are women a discriminated-against category? Were they so at the time of Roe v. Wade? Are they so now in all states, or just in some? These inquiries in turn raise all sorts of questions about the legislative representation, financial independence, and past treatment of women in the polity as a whole and in the relevant jurisdictions. All of these questions go to the issue of whether legislatures can be counted on to look after women's rights as they would men's, or whether they are apt "cheaply" to further some values they presumably believe in, because the burden falls on women.

Second, do the relevant jurisdictions have a significant number of other laws that require good samaritanism and lifesaving obligations? Do they require such service when the cost of these efforts in libertarian autonomy is borne by those whom the legislators represent and is as heavy as the costs of unwanted pregnancies are to women? It is no answer to say that all such cases are in some ways different from abortion. Of course they are. The point of the question is simpler than that; it is to see whether the jurisdiction in general rates communal values, such as lifesaving, above individual autonomy, or just happens to do so in an admittedly somewhat different situation in which the parties burdened are "outsiders."

Third, have the relevant jurisdictions made a genuine attempt to spread the burden to all of us, or have they left it on the pregnant women? Even short of actual compensation for pregnancy, which
presents some complex problems, one can consider what kind of prenatal care exists, what kind of postnatal facilities are available, and the degree to which the jurisdiction is willing to tax itself — that is, all of us — to ease the burden on those it would require to carry a pregnancy to term.

Fourth, and perhaps most importantly, has any attempt been made to place an analogous burden on men who engage in sex generally, or on the pregnant woman's partner specifically? My seemingly fanciful invasions of privacy requiring such men to save lives by being transplant donors, might well be considered.

My point is not, however, even to begin to approach the issue of the validity of Roe v. Wade and of anti-abortion laws under Type II jurisprudence. It is only to indicate the kinds of issues that a Court

218 See supra note 42 and accompanying text.

219 See supra note 43 and accompanying text. Of course, there remains the question of whether fetuses qualify as an outcast group. If fetuses do, however, and anti-abortion laws are regarded as genuine attempts to benefit an outcast group, such laws raise other antidiscrimination concerns because they help these outcasts by exclusively burdening another outcast group, women. In a sense, this raises the same issues as certain kinds of affirmative action — in particular, preferential programs whose burdens fall disproportionately on groups such as Jews and Asian-Americans. See supra note 62 and accompanying text. For other general discussions of Roe v. Wade in terms of antidiscrimination notions, see Calabresi, supra note 134, at 97, 99-101, 108-14; and Donald Regan, Rewriting Roe v. Wade, 77 U. Mich. L. Rev. 1569 (1979).

220 Interestingly, substantial Type III (Bickellian) issues are also raised by the Court's retreat in recent years from Roe v. Wade. See, e.g., Rust v. Sullivan, 111 S. Ct. 1759, 1778 (1991) (upholding regulations forbidding employees of federally funded family planning programs from discussing abortion or abortion-related activities with clients); Webster v. Reproductive Health Servs., 492 U.S. 490, 511 (1989) (upholding a state law preventing the "use of public employees and facilities for the performance or assistance of nontherapeutic abortions"); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding a state regulation prohibiting the use of federal Medicaid funds to reimburse poor women for the cost of abortions); Poelker v. Doe, 432 U.S. 519, 521 (1977) (upholding a city hospital policy of not providing nontherapeutic abortions); Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a state regulation excluding the funding of nontherapeutic abortions from a state welfare program). How will the Court deal with old anti-abortion statutes that Roe and its progeny invalidated? Will it simply ignore the fact that for a time these statutes were held to violate fundamental rights and allow them to be enforced? Or will it require present day legislatures to indicate just what kinds of anti-abortion laws, if any, they really want? The same may apply to anti-abortion laws that were passed since Roe and that, until Webster, were clearly invalid. Will the Court — incorrectly — assume that such laws were passed in a world in which both pro-choice and pro-life parties were really engaged in the legislative struggle and hold them valid, or will it conclude that such laws were legislative "freebies" — passed by legislators who were pressed by pro-life advocates and not made subject to significant counterpresures because the pro-choice people relied on past decisions to render the laws void? These last statutes present harder cases than those of pre-Roe laws, but the fact that until Roe, the whole legislative trend was toward "liberalization" of abortion, while after that decision it went decidedly the opposite way, cannot lightly be ignored by a Court that cares about bringing forth majoritarian results.

Of course, if the Court starts from the proposition that abortion is wrong and that its job is to favor anti-abortion laws, an activist re-validification of old anti-abortion laws can be readily
would concern itself with if it were truly trying to find out whether anti-abortion laws were wanted by "The People" or were enacted only because the dominant legislative majority was not burdened by such laws. That the Rehnquist Court not only asks none of these questions, but also makes no suggestion that certain answers to them might make a reversal of *Roe v. Wade* more likely (because such a reversal would occur in a context in which legislatures could genuinely be relied upon to take women's rights as seriously as men's), suggests that the Court is not moved primarily by the allegedly weak constitutional foundation of *Roe v. Wade* nor by a desire to defer to majoritarian wishes. Rather, it indicates that what is motivating the ever-growing number of dissenters from *Roe v. Wade* on the Court is their personal antipathy to abortion. Overruling *Roe v. Wade*, but only if men are made to bear similar burdens to women, or if women are adequately represented in legislatures, would greatly increase the chances that states will permit abortions. Such a result would not be troublesome to those who object to *Roe v. Wade* for its allegedly non-majoritarian basis or its reliance on a non-enumerated "right to privacy." It would be anathema to those who despise abortions.

Individual Justices have, of course, a perfect right to abhor abortion. But if that is what moves them, they are no different from what they claim the *Roe v. Wade* majority to have been: judges who are willing to impose their own values on the polity. And that is very different from judges who use Type II jurisprudence to learn what the polity's true values are when the whole polity must bear the burden of enforcing those values.

This point can be seen even more dramatically in cases such as *Rust*, which involved regulations that in practice make abortion much harder for the poor than the rich, and *Hodgson v. Minnesota*, which involved rules that make abortion harder for minors. These cases

understood. But let no one be fooled. It would not be majoritarian deference that moved the Court. It would be plain old-fashioned ideology. The same is not true of the reverse position. Like it or not, *Roe v. Wade* was decided; it did create a constitutional right. Whether it did so correctly or not is a question that the Court can legitimately address. But given that such a right was recognized, the Court cannot, without abandoning passive virtues and acting willfully, fail to use that right as the starting point and hold valid only those abortion restrictions enacted by legislatures that have taken a current and open position flowing from a debate in which all sides are genuinely engaged.

My position on this is, of course, neutral with respect to the merits of pro-choice and pro-life. It implies that the opposite starting point would be appropriate if the previously recognized fundamental right had been that of the fetus. *Cf.* Judgment of Feb. 25, 1975, Entscheidungen Des Bundesverfassungsgerichts, 39 BVerfGE 1 (finding a liberalized abortion law unconstitutional because it granted insufficient protection to the fetus's right to life).


222 See id. at 2944, 2970 (upholding a state law requiring two-parent notification and a 48-hour waiting period after notification as long as a judicial bypass option is available to a minor seeking an abortion).
underscore the result-orientation of the Rehnquist Court's anti-abortion contingent. Rather than focusing on whether similar restrictions would be enacted if all women were subject to the restrictions (instead of only the poor and those who because of youth are necessarily not represented in legislatures), the Court blithely upheld the restrictions because, one is tempted to speculate, they reduced the number of abortions. Type II jurisprudence would find these rules more questionable than generalized anti-abortion laws, because poor women and under-age women are surely even more powerless than women in general.

Of course, as I noted earlier, most courts are inadequate protectors of rights when discrimination on the basis of wealth is involved, and thus one should not be surprised at the Rehnquist Court's failure to use Type II analysis in such cases. The Court's unwillingness to consider the young as a category requiring special judicial protection is more germane, however, and more indicative of its general reluctance to submit laws to Type II remands when the result of those laws accords with the Justices' own desires and values.

Equally indicative of the Rehnquist Court's more general failure to understand its Type II functions are the cases in which the Court has required discriminatory motives rather than impact as a prerequisite to invalidating laws. Such decisions have to be based on the belief that discriminatory laws are passed, by and large, by bigots. But most laws that discriminate are passed by well-meaning people who favor a given result as long as they do not have to pay for it.

The Rehnquist Court would be appalled if it were told to uphold all uncompensated takings of land unless an intent to discriminate against the landowner could be shown. It would respond that a public purpose does not save such actions. We all want access to the sea or a beautiful park as long as someone else pays. The point of the Takings Clause is to make sure that we all pay. But that is precisely the point of all Type II jurisprudence. By moving to motive requirements — in cases in which it has little sympathy with the losers and much sympathy with the "value" supposedly fostered by the challenged rule — the Rehnquist Court once again demonstrates that

---

223 See supra pp. 128-30.
224 See, e.g., Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment does not preclude the death penalty for 16- or 17-year-old offenders); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (holding that the First Amendment does not prohibit censorship of a public high school newspaper by the principal). To the extent that the Court has been sympathetic to children at all, it has been so only with respect to very young children. See Maryland v. Craig, 110 S. Ct. 3157, 3169 (1990) (upholding, against Sixth Amendment challenge, a state procedure permitting child abuse victims to testify without face-to-face confrontation with the defendant).
225 See supra notes 106-07 and accompanying text.
226 See supra p. 93.
it is not concerned with discerning the values held by an open and nondiscriminating legislative majority. It is simply playing the old game of approving what it likes.

Let me be clear. The majority in *Roe v. Wade* was also imposing its own values. That is an appropriate criticism made of Justice Brennan's Type I approach to constitutional adjudication. Similarly, the issue is not my view, or yours, of the desirability of Justice Brennan's values as compared to those of Justice Scalia. The point must be deeper.

There are rights in our Constitution that appropriately have been accorded Type I protection. They tend to be those rights that are enumerated, that were clearly intended in this nation's constitutive moments, or that are truly necessary to the establishment of representative legislatures and executives. The failure of the Rehnquist Court to give full protection to some of these rights—allegedly out of fear of judicial abuse—is misguided, especially in view of the Court's willingness to accord Type I protection to some much less well-grounded rights.227

In other situations, however, the government or its minions enact rules that come close to infringing on enumerated rights or that violate what many, including judges and philosophers, deem to be fundamental rights despite their lack of firm grounding in our Constitution or its revisions. As to these, our tradition is best served by seeing to it that the people, or the people's representatives, acting openly and with the people watching them, express themselves. Do "We The People" really want such a putative right to be violated? Such mini-constitutional moments can be meaningful statements of the people's values only if the burden of the violation falls on all the people or on those who dominate its legislatures and not just on the weak, the outcasts, the little ones of our society.228 Type II and Type III jurisprudence allow the people to be heard in such cases. In each case, the danger that the Court will ultimately impose its values on the polity when it remands such rules for Type II or III violations is small, because—unless the polity wishes to discriminate—the polity can affirm its values and can in practice declare the putative right to be unimportant.229

---

227 See supra p. 137.

228 See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 190–91 (1986) (upholding a Georgia anti-sodomy law but limiting its application to homosexuals); see also cases cited supra note 162 (upholding severe burdens on poor women).

229 There is no doubt that some judges will approach Type II and Type III review aggressively, some passively, and still others with caution—just as many judges do with respect to Type I review. See supra note 98. Yet for many of the reasons already discussed, the variations brought on by activism or passivity in defining the relevant Type II and Type III terms, such as "historically excluded" or "haste" or "hiding," are not nearly as significant—and dangerous—as analogous variations with respect to definitions of Type I review of "fundamental rights."
Remanding when few would say that a right is involved, or when the legislature has already acted openly, or when there is no discriminatory burden on the underrepresented, can be willful. But a failure to remand when many believe that a right is at stake and when haste or hiding has occurred, or when the burden of the rule falls on those who cannot protect themselves in legislatures is at least as willful. It represents an effort to avoid letting the people express their views in an open and nondiscriminatory fashion. It is nothing more than an activist attempt to further a result the judge favors.

I believe that the Rehnquist Court's failure to use Type II and III approaches constitutes just such result-oriented judicial activism — it exhibits a selective enforcement of rights generally supporting state power and eroding libertarian values. Obscuring this activism behind claims of deference to majority wishes is both false and hypocritical. As serious as the Rehnquist Court's failures are in other areas, such as supervision of procedural fairness in criminal cases, none is more serious and ultimately more destructive of our constitutional structure than the failure properly and judiciously to apply Type II and Type III review.