

**Phil 116, February 24, 2010**  
**Ely, *Democracy and Distrust***

**Two views on interpreting the Constitution:**

- *Interpretivism*: judges should only enforce norms “stated or clearly implicit” in the written Constitution
- *Noninterpretivism*: judges should *also* enforce norms *not* “stated or clearly implicit” in the written Constitution

**Why interpretivism is appealing:**

*First*, more democratic. A basic challenge to judicial review: Why should *unelected* judges be able to overrule the decisions of *elected* representatives? The interpretivist can answer that since the judges are just applying what the Constitution says, and since “the people” ratified the Constitution, the judges are just doing what the people say.

*Problem*: “The people” that settled most parts of the Constitution is now long dead.

*Second*, interpretivism fits our usual conception of what law is and how it works. In general, judges are not supposed to enforce their own opinions rather than the letter the law.

*Problem*: The *letter* of the Constitution tells us to *look beyond* the letter of the Constitution.

- The 14<sup>th</sup> Amendment “contains provisions that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment of the debates that led up to it.”
- Equal Protection Clause of the 14<sup>th</sup> Amendment: “No State shall...deny to any person within its jurisdiction the equal protection of the laws.”
  - If *all* unequal treatment is forbidden, then there will be almost no law at all. The law often distributes certain benefits and burdens to some and not others.
  - So *some substantive* judgments must be made about when unequal treatment is acceptable.
  - But “...the answer to the question of what inequalities are tolerable under what circumstances... will not be found anywhere in its terms or in the ruminations of its writers.”
  - Nor can we restrict its application to a special class of cases involving “equality.” Almost any legal matter involves equality. Hence a “rather sweeping mandate to judge of the validity of all governmental choices.”

**Dilemma:**

- “An interpretivist approach—at least one that approaches constitutional provisions as self-contained units—proves on analysis incapable of keeping faith with the evident spirit of certain of the provisions.”
- “When we search for an external source of values with which to fill in the Constitution’s open texture”—noninterpretivism—“however—one that will not simply end up constituting the Court a council of legislative revision—we search in vain.”

### **A third option?**

Focus judicial review on:

1. Ensuring everyone's equal, effective participation in decision-making.
    - support of political expression and association
    - striking down unfair voter qualification requirements
    - correcting malapportionment
  2. Preventing discrimination against minorities.
- These are not themselves “substantive” or “outcome-driven aims: they do not identify specific fundamental values that must be achieved.
  - Instead, they are “formal” or “procedural” aims: to ensure that decisions really are democratic, really do represent the popular will.
  - A division of labor: the judiciary ensures that democracy is working, but it leaves it to democracy—the legislature—to settle the substantive questions.
  - But what does 2—preventing discrimination against minorities—have to do with ensuring that democracy is working? By forcing officials to treat the minority as they do the majority, the requirement of equal treatment ensures that *everyone is effectively represented*. Officials cannot promote the interest of the majority while neglecting those of the minority. If officials seek to promote the interests of the majority, then, since they cannot discriminate, they must promote the interests of the minority as well.

### **Arguments for this third option:**

First, *makes sense of our Constitution*.

- Most of the constitution has to do with process, rather than the specific values.
- Even the Bill of Rights...
  - The expression provisions of the First Amendment—“Congress shall make no law... abridging the freedom of speech, or of the press; or of the people peaceably to assemble, and to petition the Government for a redress of grievances”—mainly intended to make democracy work.
  - The Free Exercise Clause (freedom of religion) has been used mainly to protect minorities.
- The Reconstruction amendments, like the 14<sup>th</sup>, chiefly intended to extend the franchise to, and to ensure equal treatment of, freed slaves.
- And most of the post-Reconstruction amendments have extended the franchise.

Second, *not in conflict with democracy*, insofar as it aims simply to make democracy work.

Third, *gives courts a job that they can do better than political officials*.

“Obviously our elected representatives are the last persons we should trust with identification of [when democracy isn't working]. Appointed judges, however, are comparative outsiders in our governmental system, and need worry about continuance in office only very obliquely. This does not give them some special pipeline to the genuine values of the American people... It does, however, put them in a position objectively to assess claims... that either by clogging the channels of change or by acting as accessories to majority tyranny, our elected representatives in fact are not representing the interest of those whom the system presupposes they are.”