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TENNESSEE v. GARNER AND THE DEMOCRATIC PRACTICE OF JUDICIAL REVIEW

STEVEN L. WINTER*

INTRODUCTION

In *Tennessee v. Garner*,[1] the Supreme Court considered the constitutionality of the former Tennessee statute that codified the common law fleeing felon doctrine.[2] Under that doctrine, the police were permitted to use deadly force when necessary to prevent the escape of a fleeing suspect who the officer reasonably believed had committed a felony. Although the doctrine did not permit the use of deadly force to prevent the escape of suspected misdemeanants,[3] it recognized no distinctions between suspected felons who were violent and dangerous and those who were not. The historical roots of the doctrine lay deep in the common law, going back to the tenth century and concepts of forfeiture and summary punishment that were inherent in the traditional notion of felony.[4]

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1. 105 S. Ct. 1694 (1985).

2. The former statute, which dated from the Tennessee Code of 1858, provided that: "If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all the necessary means to effect the arrest." TENN. CODE ANN. § 40-7-108 (1982) (formerly § 48-808). Two months after the decision in *Garner*, Tennessee amended the statute to comply with the Court's ruling. The amended statute added the following qualifications:

> (b) Notwithstanding [the above], deadly force is authorized to effect an arrest only if all other reasonable means of apprehension have been exhausted, and, where feasible, warning has been given the defendant, by identifying himself or herself as such officer, or an oral order to halt, or an oral warning that deadly force might be used, and:
> (1) The officer has probable cause to believe defendant has committed a felony involving the infliction or threatened infliction of serious physical harm to the officer or to any person in the presence of the officer; or
> (2) The officer has probable cause to believe that the defendant poses a threat of serious physical harm, either to the officer or to others unless he is immediately apprehended.
> (c) All law enforcement officers, both state and local, shall be bound by the foregoing provisions and shall receive instruction regarding implementation of same in law enforcement training programs.

TENN. CODE ANN. § 40-7-108 (Supp. 1985).

3. *See, e.g.*, Johnson v. State, 173 Tenn. 134, 114 S.W.2d 819 (1938).

4. *See* 4 W. BLACKSTONE, COMMENTARIES 98 (13th ed. 1800); F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 465 (2d ed. 1909); Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 81 (1980).

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Garner involved the shooting death of a fifteen-year-old fleeing burglary suspect who had entered a house when no one was home and stolen a coin purse containing ten dollars. The officer shot Garner to prevent his escape despite the fact that the officer had concluded that Garner was unarmed.[5] The Court held that the shooting violated the fourth amendment. It upheld the constitutionality of the Tennessee statute only as applied to situations in which "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . . ."[6] It arrived at this standard by applying the balancing test developed in *Terry v. Ohio*[7] and its progeny,[8] "balancing the extent of the intrusion against the need for it, [and] examin[ing] the reasonableness of the manner in which a search or seizure is conducted."[9] That analysis yielded the relatively obvious conclusion that: "Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so."[10]

At the time of the *Garner* decision, almost half the states ostensibly still followed the common law rule.[11] Eighteen states did so by statute,[12] four

5. *Garner*, 105 S. Ct. at 1697. The officer testified that he was "reasonably sure" that Garner was unarmed. Indeed, on direct examination by the city's attorney, the officer was asked: "Did you know positively whether or not he was armed?" He answered: "I assumed he wasn't. . . ." Record at 639, Garner v. Memphis Police Department, Civil Action No. C-75-145 (W.D. Tenn.) (1976).

6. *Garner*, 105 S. Ct. at 1701.

7. 392 U.S. 1, 28 (1968). The *Terry* balancing test was presaged in Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

8. *See, e.g.*, United States v. Place, 462 U.S. 696 (1983); United States v. Villamonte-Marquez, 462 U.S. 579 (1983); Florida v. Royer, 460 U.S. 491 (1983); Michigan v. Summers, 452 U.S. 692 (1981).

9. *Garner*, 105 S. Ct. at 1699.

10. *Id.* at 1701.

11. The use of the term ostensible is predicated on the fact that, in this area, it is not always possible to ascertain reliably the actual "law" or practice of a given state. This may manifest itself in one of three ways. First, a state may putatively follow the common law rule but in actuality allow the use of deadly force even beyond the strictures of the common law. This, for example, was the actual experience in Tennessee. In Memphis, there were 116 shootings by Memphis police during the years 1969 through 1974. Many of these cases involved the shooting of escaping misdemeanants or of suspected felons who could have been apprehended by means other than the use of deadly force. The common law did not authorize deadly force in either situation. Nevertheless, throughout this period there were no prosecutions or internal disciplinary actions against the police. And, with the exception of one case that settled, none of the suits against Memphis or its police were successful until *Garner*.

Second, there were states whose courts followed the common law but whose police departments follow a more restrictive approach. For example, Michigan was a common law jurisdiction. Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982). But more than half of the local law enforcement agencies, including all those of the largest jurisdictions within the state, had deadly force policies more restrictive than the common law. *See* Staff Report of the Michigan Civil Rights Commission at 54 (May 18, 1981).

Third, there were states in which the court decisions simply are unclear. For example, Massachusetts had followed the common law. Uraneck v. Lima, 359 Mass. 749, 269 N.E.2d 670 (1971). But, in 1977, it applied the limitations of the Model Penal Code provision, *see infra* note 16, to the actions of private citizens. Commonwealth v. Klein, 372 Mass. 823, 363 N.E.2d

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others by case law.[13] In two states, the courts had narrowly construed existing statutes to authorize deadly force to prevent escape only in cases involving forcible felonies or where necessary to prevent injury.[14] Of the remaining states, two applied standards more restrictive than the common law rule as a matter of case law.[15] The others had statutes that either adopted the limiting principles of the Model Penal Code provision or otherwise specified the felonies justifying the use of deadly force. Three states had no relevant statute or case law and two had unclear positions, but seemed to be more restrictive than the common law.[16]

1313 (1977). A later case suggested that the same standards might be applied to the police. Julian v. Randazzo, 380 Mass. 391, 403 N.E.2d 931 (1980). Similarly, in Giant Food, Inc. v. Scherry, 51 Md. App. 586, 444 A.2d 483 (1982), a Maryland case involving a private security guard, an intermediate appellate court held that deadly force could be used only to prevent the escape of a suspect who had committed a forcible felony and who continued to present an imminent danger—a standard stricter than that adopted by the Court in *Garner*.

12. ALA. CODE § 13A-3-27 (1982); ARK. STAT. ANN. § 41-510 (1977); CAL. PENAL CODE § 196 (West 1970); CONN. GEN. STAT. § 53a-22 (1972); FLA. STAT. § 776.05 (1983); IDAHO CODE § 19-610 (1979); IND. CODE § 35-41-3-3 (1982); KAN. STAT. ANN. § 21-3215 (1981); MISS. CODE ANN. § 97-3-15(d) (Supp. 1984); MO. REV. STAT. § 563.046 (1979); NEV. REV. STAT. § 200.140 (1983); N.M. STAT. ANN. § 30-2-6 (1984); OKLA. STAT. tit. 21, § 732 (1981); R.I. GEN. LAWS § 12-7-9 (1981); S.D. CODIFIED LAWS ANN. §s 22-16-32, -33 (1979); TENN. CODE ANN. § 40-7-108 (1982); WASH REV. CODE § 9A.16.040(3) (1977); *see also* OR. REV. STAT. § 161.239 (1983) (use of deadly force limited to violent felons, but also allowed against any felon if "necessary"); WIS. STAT. § 939.45(4) (1981-82) (officer may use force necessary for "a reasonable accomplishment of a lawful arrest"). *But see* Clark v. Ziedonis, 368 F. Supp. 544 (D. Wis. 1973), *aff'd on other grounds*, 513 F.2d 79 (7th Cir. 1975) ("Before force which is likely to cause death or great bodily harm can be used, one must reasonably believe that it is necessary to prevent imminent death or great bodily harm)."

13. These states are Michigan, Ohio, Virginia, and West Virginia. Werner v. Hartfelder, 113 Mich. App. 747, 318 N.W.2d 825 (1982); State v. Foster, 60 Ohio Misc. 46, 59-66, 396 N.E.2d 246, 255-58 (Com. Pl. 1979); Berry v. Hamman, 203 Va. 596, 125 S.E.2d 851 (1962); Thompson v. Norfolk & W.R. Co., 116 W. Va. 705, 711-12, 182 S.E. 880, 883-84 (1935).

14. In California, deadly force may be used only if the crime for which the arrest is sought was "a forcible and atrocious one which threatens death or serious bodily harm," or if there is a substantial risk of death or serious bodily harm if apprehension is delayed. Kortum v. Alkire, 69 Cal. App. 3d 325, 333, 138 Cal. Rptr. 26, 30-31 (1977); *see also* People v. Ceballos, 12 Cal. 3d 470, 476-84, 116 Cal. Rptr. 233, 237-42, 526 P.2d 241, 245-50 (1974); Long Beach Police Officers Ass'n v. Long Beach, 61 Cal. App. 3d 364, 373-74, 132 Cal. Rptr. 348, 353-54 (1976). In Indiana, deadly force may be used only to prevent injury, the imminent danger of injury or force, or the threat of force—not simply to prevent escape. Rose v. State, 431 N.E.2d 521 (Ind. App. 1982).

15. Though without statutes or case law on point, Louisiana and Vermont forbid the use of deadly force except to prevent violent felonies. *See* LA. REV. STAT. ANN. § 14:20(2) (West 1974); VT. STAT. ANN., tit. 13, § 2305 (1974 & Supp. 1984). In *Sauls v. Hutto*, a district court interpreted the Louisiana statute to limit the use of deadly force against fleeing suspects to situations where "life itself is endangered or great bodily harm is threatened." 304 F. Supp. 124, 132 (E.D. La. 1969). *Sauls*, however, was affirmed on other grounds.

16. Hawaii and Nebraska have adopted the Model Penal Code's provision verbatim. *See* HAW. REV. STAT. § 703-307 (1976); NEB. REV. STAT. § 28-1412 (1979). With slight variations in language, eighteen other states allow the use of deadly force if the suspect has committed a felony involving the use or threat of physical or deadly force, or is escaping with a deadly weapon, or is likely to endanger life or inflict serious physical injury if not arrested. *See* ALASKA STAT. ANN. § 11.81.370(a) (1983); ARIZ. REV. STAT. ANN. § 13-410 (1978); COLO. REV. STAT. § 18-1-707 (1978) DEL. CODE ANN., tit. 11, § 467 (1979) (felony involving physical

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Thus, the *Garner* ruling upset the legislative determinations of more than a third of the states, a seemingly striking example of the countermajoritarian practice of judicial review. Indeed, in *Garner*, the state and city defendants argued that the advisability of a more restrictive standard governing the use of deadly force was a policy question of the sort that properly belongs to the legislative process.[17] The Court's opinion did not respond to that argument directly. Rather, it applied a familiar legal analysis. First, it considered the doctrinal requirements of the fourth amendment balancing test.[18] It rejected the state's historical argument premised on the coexistence of the common law rule with the adoption of the fourth amendment. This historical approval of the rule was irrelevant because of the substantial changes in the underlying realities.[19] The Court then considered the "reasonableness" of the stricter standard it imposed in light of the actual practices of American police departments.[20] Finally, on the basis of uncontradicted empirical evidence, the Court rejected the argument that burglary is an inherently dangerous crime that, under the Court's own rule, justified the use of deadly force to prevent escape.[21]

On the surface, then, the Court's opinion follows a classic doctrinal pro-

force *and* a substantial risk that the suspect will cause death or serious bodily injury *or* will never be recaptured); GA. CODE § 16-3-21(a) (1984); ILL. REV. STAT., ch. 38, § 7-5 (1984); IOWA CODE § 804.8 (1983) (suspect has used or threatened deadly force in commission of a felony, or would use deadly force if not caught); KY. REV. STAT. § 503.090 (1984) (suspect committed felony involving use or threat of physical force likely to cause death or serious injury, *and* is likely to endanger life unless apprehended without delay); ME. REV. STAT. ANN. tit. 17-A § 107 (1983) (person to be arrested poses a threat to human life); MINN. STAT. § 609.066 (1984); N.H. REV. STAT. ANN. § 627:5(II) (Supp. 1983); N.J. STAT. ANN. § 2C-3-7 (West 1982); N.Y. PENAL LAW § 35.30 (McKinney Supp. 1984-85); N.C. GEN. STAT. § 15A-401 (1983); N.D. CENT. CODE § 12.1-05-07.2.d (1976); PA. STAT. ANN. tit. 18 § 508 (Purdon); TEX. PENAL CODE ANN. § 9.51(c) (1974); UTAH CODE ANN. § 76-2-404 (1978). Though it once rejected distinctions between felonies, Uraneck v. Lima, 359 Mass. 749, 750, 269 N.E.2d 670, 671 (1971), Massachusetts has since adopted the Model Penal Code limitations with regard to private citizens, Commonwealth v. Klein, 372 Mass. 823, 363 N.E.2d 1313 (1977), and seems to have extended that decision to police officers. Julian v. Randazzo, 380 Mass. 391, 403 N.E.2d 931 (1980). "A Maryland appellate court has indicated, however, that deadly force may not be used against a felon who 'was in the process of fleeing and, at the time, presented no immediate danger to . . . anyone. . . .' Giant Food, Inc. v. Scherry, 51 Md. App. 586, 589, 596, 444 A.2d 483, 486, 489 (1982)." *Garner*, 105 S. Ct. 1704-05 n. 20. Montana, South Carolina, and Wyoming are the states that either have no relevant statute or case-law.

17. Brief for Appellant in No. 83-1035, at 13-17; Reply Brief for Appellant in No. 83-1035, at 3-6; Brief for Petitioners in No. 83-1070, at 11, 19-21; Reply Brief for Petitioners in No. 83-1070, at 4.

18. *Garner*, 105 S. Ct. at 1700.

19. *Id.* at 1702-03. *See infra* notes 148-55 and accompanying text.

20. *Garner*, 105 S. Ct. at 1703-07.

21. *Id.* at 1706-07. The Court cited the then recent Justice Department report, BUREAU OF JUSTICE STATISTICS, HOUSEHOLD BURGLARY (1985), which found that over a ten year period, only 3.8% of all burglaries involved a violent crime. *Id.* at 4. The statistics presented by Mr. Garner were strikingly similar. Two studies found a confrontation rate of less than 3%, with an even lower rate of violence during those confrontations. T. REPPETTO, RESIDENTIAL CRIME 17, 105 (1974); Conklin & Bittner, *Burglary in a Suburb*, 11 CRIMINOLOGY 208, 214 (1973). Only 1% of all burglaries became robberies, only .6% of all murders occurred during

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gression that measures the state statutory rule against a constitutional analysis that considers text, precedent, history, and public policy. Yet a closer examination of the analyses that the Court invoked to support its judgment reveals a process at work that is quite different—and certainly more complex—than the conventional conception of judicial review as a countermajoritarian, undemocratic process.

To explicate this, it is helpful first to consider two distinct but related phenomena apparent in the Court's opinion. The section that follows explores the relationship between the Court's doctrine, its process of norm articulation, and the importance of preexisting practice or custom. The discussion then turns to a consideration of the sociology of the Court's norm articulating role. Section III discusses the inutility of a purely historical approach. The concluding section considers some of the implications of these observations for the current debate about the scope and legitimacy of judicial review.

I
JUDICIAL REVIEW IN THE DEMOCRATIC NORM ARTICULATING MODE

In *Garner*, the Court devoted two subsections of its opinion to an analysis of the statutory provisions and police department policies governing the use of deadly force. While the second section focused on the practicability of the Court's restrictive standard,[22] the first, somewhat longer section was of a very different sort. It consisted of an open effort to divine a national trend or consensus concerning the common law rule and the appropriateness of the use of deadly force against nondangerous suspects. The Court noted that "the long term movement has been away from the rule" and that "[t]his trend is more evident when viewed in light of the policies adopted by the police departments themselves."[23]

True, the Court never explicitly stated that its judgment depended upon the majority practice. Typically, it put the issue in the negative: "[T]he older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute. . . ."[24] Nevertheless, the Court seemed to rely heavily on the fact that: "Overall, only 7.5% of departmental and municipal policies permit the use of deadly force against any felon; 86.8% explicitly do not."[25] Not incidentally, it cited to and relied on the amicus brief filed by several police organizations and individual police departments in support of the respondent, Mr. Garner.[26] This was the only amicus brief from the professional

burglaries, and only 6.5% of all rapes occurred in a residence between strangers. T. REPPETTO, *supra*, at 5, 93.

22. *Garner*, 105 S. Ct. at 1705-07.
23. *Id.* at 1705-06.
24. *Id.*
25. *Id.*
26. *Id.*

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police community in the case.

The Court explained its search for "prevailing rules" as necessary "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment."[27] It relied on *United States v. Watson* as authority, but cited to the part of *Watson* that considered the historical continuity of the common law practice at issue in that case.[28] Thus, *Watson* fails to explain the legal relevance of the Court's search for consensus in the national practice, since the Court's opinion in *Garner* had already deconstructed the historical chain.

The cynic might perceive that, in seeking a consensus in existing law for the rule it was imposing as a matter of constitutional imperative, the Court was doing nothing more than acting prudently to cover its political flank. Perhaps so. Perhaps the Court's attempt to build on *Watson* was intended to yield a rule of construction for the fourth amendment: that its prohibition of "unreasonable" searches and seizures is to be defined in terms of current practice. But neither *Watson* or *Garner* suggest that there is an historical basis for that rule.

The Court's prior cases, however, suggest a different, more defensible basis for that rule. Although the *Garner* Court did not rely on it for this point, *Payton v. New York*[29] had previously canvassed and relied on current practice as a basis for invalidating an arrest procedure. In *Payton*, the Court held that the warrantless entry into a home to make an arrest violated the fourth amendment. In reaching that conclusion, it engaged in an analysis which paralleled that in *Garner*. It observed that "[o]nly 24 of the 50 States currently sanction" the practice and that "there is an obvious declining trend . . . ," and argued that the trend and "the depth of the principle underlying" those state determinations supported the Court's result.[30] It explained this reasoning as appropriate "when the constitutional standard is as amorphous as the word 'reasonable,' and when custom and contemporary norms necessarily play such a large role in the constitutional analysis."[31]

The Court's analysis in both *Payton* and *Garner* is one that treats the fourth amendment's concern with what is "reasonable" as an invitation to decide questions of principles and values. Given that analysis, the Court's concern with current practice is both defensible and suggestive of a process that is quite sophisticated. For if the Court is engaged in the explication of

27. *Id.* at 1703.

28. *Id.* (citing United States v. Watson, 423 U.S. 411, 421-22 (1976)). In *Watson*, the Court held that it was not necessary to obtain a warrant to make an arrest in a public place. The Court relied on the historical sanction of the practice in approving it as permissible under the fourth amendment. *Id.*

29. Payton v. New York, 445 U.S. 573 (1980). Although *Garner* did cite *Payton* for the proposition that the fourth amendment does not approve all police practices extant at the time of its adoption, *Garner*, 105 S. Ct. at 1702, it cited *Watson* and not *Payton* in its discussion of the relevance of current practice. The reason for this may be that Justice White, the author of the *Garner* decision, also wrote *Watson* but dissented in *Payton*.

30. *Payton*, 445 U.S. at 600; *cf. Watson*, 423 U.S. at 423.

31. *Id.*

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values, it makes very good sense to refer to and be guided by the value judgments of other societal decision makers. A court should recognize that law "consists of the generally accepted social norms [to be] applied in the decision of the cases, norms that are—contrary to the positivists' position—best seen as 'part of the law,' quite independent of their promulgation through defined law making procedures."[32] Thus, contrary to the implications of cases like *Marbury v. Madison*[33] and *Cooper v. Aaron*,[34] interpretation need not flow from the top down, but may come from the bottom up as well.[35] Indeed, this vertical dialogue is especially appropriate to a process of constitutional interpretation that implicates society's values.

One would not want it any other way in a democracy. Power and authority should flow up as well as down the hierarchy of political organization. Those at the top of the political organization may have the power to declare and require adherence to societal norms—that is, to "the law." But the process requires dialogue because the viability of those norms and the legitimacy of their enforcement depends to a very large extent on the existence of a consensus—whether emerging or preexisting—amongst society.

Thus, those who have labeled themselves "noninterpretivists"[36] or, now, "supplementers,"[37] are certainly correct in the descriptive sense and, more than arguably, in the normative sense as well when they claim that the Constitution's "broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared values."[38] But, I think, they are incorrect in asserting that the legitimacy of that process is grounded solely in an "interpretivist" methodology, whether strict constructionist or supplementing.[39] Rather, cases like *Garner* exemplify a process of dialogue in the "explication of basic shared values" that has become one of the major, though not exclusive, modes of constitutional exposition. In a number of constitutional

32. *Cf.* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 28 (1967). Interestingly, the Court's focus on public values was also revealed during the course of oral argument, albeit in a question by one of the dissenters. Justice O'Connor's question—"What do you suppose the homeowners feel about whether someone who burglarizes a home is a danger to the community?", Official Transcript of Proceedings before the Supreme Court of the United States, Dkt/Case No. 83-1035 & 83-1070 at 42 (Oct. 30, 1984)—suggests a concern with public values and mores that is not reflected in her dissenting opinion: "But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality." *Garner*, 105 S. Ct. at 1709 (citing Spaziano v. Florida, 104 S. Ct. 3154, 3165 (1984), discussed *infra* notes 67-72 accompanying text.).

33. 5 U.S. (1 Cranch) 138, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")

34. 358 U.S. 1, 18 (1959) ("the federal judiciary is supreme in the exposition of the law of the Constitution. . . .").

35. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 715 n.48 (1975) (citing Dworkin, *supra* note 32; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973)).

36. Grey, *supra* note 35.

37. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

38. Grey, *supra* note 35, at 709.

39. *Cf. id.* at 706 (asserting that the primary task of adjudication is one of interpretation).

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areas, the Court has developed doctrines that explicitly focus attention on, and implicitly draw authority from, the normative expressions of other societal decision makers.

These doctrines first developed in the modern incorporation decisions. Previously, the Court had asked whether a particular right or procedure was "implicit in the concept of ordered liberty"[40] in determining whether rights are fundamental and to be incorporated through the due process clause of the fourteenth amendment. This was a purely normative approach. Justice Frankfurter sought to anchor this process in objective criteria and, therefore, asked whether the right to be incorporated was within "those canons of decency and fairness which express the notions of justice of English-speaking peoples. . . ."[41]

As it evolved in the criminal procedure area, however, the incorporation process began to pay more attention to the congruity of the right to be incorporated with the expressed preferences of the soon to be bound states. Thus, in *Mapp v. Ohio*, the Court noted a trend toward adoption of the exclusionary rule by the states.[42] Similarly, in *Gideon v. Wainwright*, the Court took note that almost half the states urged adoption of a right to appointed counsel in criminal cases.[43] The modern decisions, however, have transformed the process into an almost explicit exercise in nose counting. Now the "question is not [whether it is] fundamental to fairness in every criminal system that might be imagined but [whether it] is fundamental in the context of the criminal processes maintained by the American States."[44] And, the Court explained, the "better guide . . . is disclosed by 'the existing laws and practices in the Nation.' "[45]

Thus, the nose counting methodology of *Garner* is not only explicable in

40. Palko v. Connecticut, 302 U.S. 319, 325 (1937) (Cardozo, J.).

41. *See* Adamson v. California, 332 U.S. 46, 67-68 (1947) (Frankfurter, J., concurring). During this period, the Court was inconsistent in its consideration of the relevance of state practice to the incorporation decision. *See* Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L. J. 319, 327-28, 330-33 (1957). *Compare* Betts v. Brady, 316 U.S. 455, 465 (1942) (majority opinion) (consensus of states is that appointment of counsel is a matter of legislative policy), *with id.* at 477 n.2 (Black, J., dissenting) (majority of states provide counsel). *See also* Leland v. Oregon, 343 U.S. 790 (1952). In *Leland*, the Court noted the importance of state judgments to the incorporation decision. *Id.* at 798. Nevertheless, it approved a unique Oregon statute that put the burden on a criminal defendant to prove his insanity beyond a reasonable doubt. Only twenty other states put the burden on the defendant; Oregon alone had fixed the burden of proof at beyond a reasonable doubt.

42. 367 U.S. 643, 651-52 & n.7 (1961) (After the decision in Wolf v. Colorado, 338 U.S. 25 (1949), "more than half of those [states] since passing upon it, by their own legislative or judicial decisions, have wholly or partly adopted or adhered to the Weeks [v. United States, 232 U.S. 383 (1914)] rule.").

43. 372 U.S. 335, 345 (1963) (noting that twenty-two states filed as amici curiae urging that Betts v. Brady, 316 U.S. 455 (1942), be overruled).

44. Duncan v. Louisiana, 391 U.S. 145, 149-50 & n.14 (1968).

45. Baldwin v. New York, 399 U.S. 66, 70 (1970); *accord Duncan*, 391 U.S. at 161; Johnson v. Louisiana, 406 U.S. 356, 372 n.9 (1972) (Powell, J., concurring).

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theoretical terms, but also has antecedents in the doctrinal terms of incorporation. More important, the same methodology is evident in the Court's analysis of the underlying constitutional provisions, irrespective of incorporation. It is, for example, at the forefront of the Court's recent death penalty jurisprudence, both in the cases where the Court has sustained the penalty and in those where it has prohibited it.

At least since *Weems v. United States*,[46] the eighth amendment has been interpreted as "progressive,"[47]—that is, it is "not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[48] This understanding of the eighth amendment was the nub of Chief Justice Warren's formulation in *Trop v. Dulles*: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[49]

The opinions of the Burger Court, however, have abandoned the more open-ended approach of judicial norm articulation characteristic of *Weems* and *Trop*. Rather, the Court's explication of national values has become a more disciplined inquiry into the normative pronouncements of other, more "democratic" political organs. This change is signaled in part by the Court's reformulation of *Trop's* "evolving standards of decency" test, which practically invited the Court to participate in that evolution. In its stead, the Court has interposed the more modest "assessment of contemporary values,"[50] which suggests a more conservative, passive role of observer and reporter.

This was most clearly illustrated in Justice Stewart's plurality opinion upholding the constitutionality of the death penalty in *Gregg v. Georgia*,[51] and has since become the dominant mode of analysis in the Court's eighth amendment cases. While the Court continues to rely on history[52] and, ultimately, its own judgment "whether [the punishment] comports with the basic concept of human dignity at the core of the Amendment . . . ,"[53] its focus has now shifted to other more pluralistic sources of society's normative values.

At this juncture, it may be useful to examine the plurality opinion in *Gregg* both for what it says about doctrine and for what kind of analytic process it employs. First, the Court invoked the rhetoric of judicial restraint:

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity.
>
> . . . .

46. 217 U.S. 349 (1910).
47. *Id.* at 378.
48. *Id.*
49. 356 U.S. 86, 101 (1958) (plurality opinion).
50. Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion) ("determination of contemporary standards").
51. *See supra* note 50.
52. *Gregg*, 428 U.S. at 176-79.
53. *Id.* at 182.

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> This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. "[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."[54]

This, of course, hardly explains the Court's opinion or process. The Court necessarily acknowledged that "[t]his does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power."[55] Any other approach would mean, in effect, that "[t]he constitution . . . is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."[56] Indeed, it would have meant that we had regressed beyond *Marbury*, for prior to *Marbury* it was established that the federal courts were empowered by the supremacy clause to hold unconstitutional the acts of state legislatures.[57]

Rather, the *Gregg* opinion is best understood as an affirmation, as a national value, of "society's endorsement of the death penalty for murder"[58] based on an assessment of the normative expressions of a variety of democratic decision makers. First, the Court observed that "[t]he most marked indication . . . is the legislative response to *Furman* [*v. Georgia*]."[59] Second, the Court noted the approval of the death penalty in California by a statewide referendum.[60] Third, the Court considered the judgments of actual juries since *Furman* and concluded that they indicated agreement with the legislative judgment in favor of capital punishment.[61] Only then, having satisfied itself that the country was in favor of the death penalty, did the Court bring its own judgment to bear and sustain the constitutionality of the death penalty.

With one notable exception,[62] the Court has continued to employ this methodology in its later capital cases. Thus, in *Coker v. Georgia*,[63] the Court recognized that "[t]he current judgment with respect to the death penalty for rape . . . obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman . . . ,"[64] and in fact

54. *Id.* at 175 (citations omitted).

55. *Id.* at 174.

56. *Marbury*, 5 U.S. (1 Cranch) at 177.

57. Prior to *Marbury*, the lower federal courts and the Supreme Court had invalidated state statutes as conflicting with constitutional or treaty provisions. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (holding state statute in conflict with treaty obligation); D. CURRIE, FEDERAL COURTS 25 (1982); 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 65-69 (Rev. ed. 1926).

58. *Gregg*, 428 U.S. at 179.

59. *Id.*

60. *Id.* at 181.

61. *Id.* at 181-83.

62. Spaziano v. Florida, 104 S. Ct. 3154 (1984).

63. 433 U.S. 584 (1977).

64. *Id.* at 596.

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deferred to that judgment. In *Enmund v. Florida*,[65] the Court noted and relied on "[s]ociety's rejection of the death penalty for accomplice liability in felony murders. . . ."[66]

Only in *Spaziano v. Florida*[67] did the Court reject "the majority view that capital sentencing, unlike other sentencing, should be performed by a jury."[68] Rather, it argued that the Constitution "is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[69] While *Spaziano* may not be the exception that proves the rule—it may be accounted for on other grounds[70]—it nevertheless suggests the Court's reluctance to ignore the power of the nose counting methodology. Indeed, the Court conceded that the "argument obviously has some appeal. . . ."[71] And it was only after noting that it "twice has concluded that Florida has struck a reasonable balance" that the Court concluded: "We are not persuaded that placing the responsibility on a trial judge to impose the sentence in a capital case is so fundamentally at odds with contemporary standards of fairness and decency that Florida must be required to alter its scheme. . . ."[72]

Similarly, one can find other examples where the substance of a constitutional guarantee is harnessed to a doctrinal standard that leads the Court to an assessment of societal values. *Garner* pegged this inquiry to the "reasonableness" requirement of the fourth amendment.[73] But the Court has also developed another fourth amendment doctrine that allows it to assess contemporary societal values and effectuate its reading of those values. Passing over Justice Stewart's majority opinion in *Katz v. United States*,[74] which was concerned with "the privacy upon which [one] justifiably relie[s] . . . ,"[75]

65. 458 U.S. 782 (1982).
66. *Id.* at 794.
67. *Spaziano*, 104 S. Ct. 3154.
68. *Id.* at 3164.
69. *Id.* at 3165.
70. In an important sense, *Spaziano* presented the question of which democratic decision maker to entrust with the life or death decision. Thus, in rejecting the argument that it must be the jury, the Court noted that "[t]he community's voice is heard at least as clearly in the legislature when the death penalty is authorized and the particular circumstances in which death is appropriate are defined." *Id.* at 3164. That the question in *Spaziano* lent itself less readily to the normative analysis described in the text is made clear by the fact that, whatever the Court concluded was required in terms of process (that is, judge sentencing or jury sentencing), the substantive decision of who should live or die would remain in the hands of a democratic organ. Indeed, in Florida, the trial judges are elected, so that at every turn the Court was confronted with a choice between two democratically representative agencies.

An analogous situation is presented in those cases where a representative legislature has chosen to restrict participation in certain limited purpose elections, like school board elections. *Compare* Kramer v. Union Free School District, 395 U.S. 621, 627-28 (1969), *with id.* at 639-40 (Stewart, J., dissenting), *and with* Ball v. James, 451 U.S. 355 (1981) (per Stewart, J.).
71. *Spaziano*, 104 S. Ct. at 3163.
72. *Id.* at 3165.
73. *Garner*, 105 S. Ct. at 1699.
74. 389 U.S. 347 (1967).
75. *Id.* at 353.

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the Burger Court has instead adopted the more normative formulation of Justice Harlan's concurring opinion: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' "[76] Here, too, the word "reasonable" is the lacuna through which the Court slips into an assessment of contemporary norms.

The result of the Court's reformulation of *Katz*[77] is that it is now free to reject fourth amendment claims when, in its view, society is not prepared to recognize the particular privacy interest. And, since the typical claimant is a criminal defendant, the Court's normative judgment that society would not approve of the particular invocation of privacy at issue has so far predictably proven correct. Thus, the Court has held that there is no legitimate expectation of privacy in the numbers one dials on one's telephone, upholding the warrantless use of a pen register in *Smith v. Maryland*.[78] Similarly, in *Hudson v. Palmer*, the Court concluded that society is not prepared to recognize as legitimate prisoners' expectation of privacy for the personal items they may keep in their cells.[79]

This phenomenon of Supreme Court reliance on its assessment of the contemporary norm is not limited to criminal procedure or even to constitutional law. This same process can be seen at work in a putatively statutory case like *Bob Jones University v. United States*.[80] When the Court held that private educational institutions that discriminate are not entitled to tax exempt status, it observed that "contemporary standards must be considered in determining whether given activities provide a public benefit and are entitled

76. *Id.* at 361.

77. There can be no doubt but that this is a reformulation. As Professor Amsterdam has observed:

> Now let us consider the word "expectation" in the "reasonable expectation of privacy" formula to which *Katz* is speedily being reduced. "Expectation" is not a term used in Mr. Justice Stewart's majority opinion in *Katz*; it has been lifted by subsequent cases from Mr. Justice Harlan's concurring opinion. . . . An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the fourth amendment protects . . . . If it could, the government could diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance. . . . In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula.

Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384-85 (1974).

78. 442 U.S. 735 (1979).

79. 104 S. Ct. 3194 (1984). In Oliver v. United States, 104 S. Ct. 1735 (1984), the Court affirmed the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924), relying primarily on a textual analysis of the fourth amendment that argued that an open field is neither a "house" nor an "effect." *Oliver*, 104 S. Ct. at 1740. Justice White would have gone no further. *Id.* at 1744. The majority, however, also considered whether society was prepared to recognize as legitimate an expectation of privacy in open fields. It concluded that society was not, despite the apparent relevance of state laws of trespass. *Id.* at 1740-42.

80. 461 U.S. 574 (1983).

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to the charitable tax exemption."[81] It found those contemporary standards in two places. First, it observed that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice."[82] Second, it noted that "myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[83]

A similar process may be observed in some of the Court's treatments of the doctrine of stare decisis. Since the Taney Court, it has been true that the doctrine carries less weight in constitutional cases.[84] One explanation is suggested in cases in which the Court has not overruled precedent. This Term, in *Vasquez v. Hillery*, the Court reaffirmed over a hundred years of precedent holding that the exclusion of blacks from the grand jury is not to be treated under the harmless error rule but rather should result in automatic reversal of the resulting conviction.[85] Justice Marshall cautioned that the Court's "decision is supported, though not compelled, by . . . stare decisis."[86] Eschewing "any rigid formula to constrain the Court in the disposition of cases . . . ," he indicated that precedent may be overruled when "changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective."[87]

Previously, Justice Stevens has expanded on his view of the kind of "changes in society" that should be considered. In *Runyon v. McCrary*,[88] Justice Stevens concurred in the Court's holding that 42 U.S.C. § 1981 proscribes purely private conduct despite his disagreement with the decision in *Jones v. Alfred H. Mayer Co.*[89] on which *Runyon* was based. Borrowing Justice Cardozo's explication of the limiting exceptions to stare decisis—"If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors"[90]—Justice Stevens reasoned that *Jones* should be adhered to: "For even if *Jones* did not accurately reflect the sentiments of the

81. *Id.* at 593 n.20.
82. *Id.* at 592.
83. *Id.* at 593-95.
84. The Passenger Cases, 48 U.S. (7 How.) 283, 470 (1849).
85. 106 S. Ct. 617 (1986).
86. *Id.* at 624-25.
87. *Id.* at 625.
88. 427 U.S. 160, 189 (1976).
89. 392 U.S. 409 (1968).
90. *Runyon*, 427 U.S. at 191 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 150-52 (1921)). Justice Cardozo was writing of the doctrine of stare decisis generally, not that in constitutional cases specifically. *Jones* and *Runyon* were both statutory and constitutional cases, involving both the interpretation of section 1981 and the reach of the thirteenth amendment.

Justice Cardozo also described the development of the common law in terms strikingly similar to that presented in the text. According to Cardozo, the common law judge acts "as the interpreter for the community in its sense of law and order . . . ;" his duty "to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. . . ." B. CARDOZO, *supra*, at 16, 106.

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Reconstruction Congress, it surely accords with the prevailing sense of justice today.... [M]y understanding of the *mores* of today [is such] that I think the Court is entirely correct in adhering to *Jones*."[91]

Similarly, a case like *Garcia v. San Antonio Metropolitan Transit Authority*[92] might best be explained by this thesis. In rejecting the state sovereignty formulation of *National League of Cities v. Usery*,[93] the Court abjured any "license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause."[94] Rather, it adopted the approach suggested by Professor Wechsler,[95] and derived from Madison's The Federalist Nos. 46 and 62,[96] relying on the political safeguards of federalism inherent in the structure of the national government: "The political process ensures that laws that unduly burden the States will not be promulgated."[97] Another way to understand *Garcia* is to see the federalist balance as an evolving one and to view the Court's position as deferring to the democratic assessment of the proper balance at any given point.

II
THE COURT AS POPULAR ORACLE

If *Garner* perhaps illustrates the Court's penchant for finding guidance in democratic pronouncements before articulating societal norms in the course of constitutional decisionmaking, it illustrates a related, though somewhat contradictory course, as well. For the other salient aspect of the Court's decision in *Garner* is that it is an essentially moral pronouncement. In a single paragraph, which altogether contains only six sentences, the Court said all it really needed to regarding both its reasoning and holding:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. *It is not better that all felony suspects die than that they escape.* Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.[98]

The highlighted sentence is the simple moral syllogism that lies at the heart of the decision.[99]

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91. *Runyon*, 427 U.S. at 191-92.
92. 105 S. Ct. 1005 (1985).
93. 426 U.S. 833 (1976).
94. *Garcia*, 105 S. Ct. at 1017.
95. *Id.* at 1018 n.11; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).
96. 105 S. Ct. at 1018 (citing The Federalist No. 46, at 332 and No. 62, at 408 (B. Wright ed. 1961)).
97. 105 S. Ct. at 1020.
98. *Garner*, 105 S. Ct. at 1701 (citations omitted).
99. Elsewhere, I have characterized the Court's opinion as premised on "a moral equation

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The predominantly moral character of the Court's decision is emphasized by the nature of the Court's disposition of the case. In remanding for further proceedings in conformity with its opinion, the Court went out of its way both to catalogue the various parties who would not be liable and to avoid ruling on the liability of the city, the only remaining defendant.[100] On the latter point, the Court noted that the city's liability hinged on *Monell v. Department of Social Services*[101]—that is, whether the city had a policy that caused the constitutional violation. Yet it was clear that the city had an explicit policy that authorized the shooting at issue; the city had even quoted the policy in its brief.[102] Moreover, the lower courts had held that the officer had shot "as he was taught."[103] There may be more than one conceivable explanation for the Court's failure to follow the trajectory of its own logic. Nevertheless, the most likely seems that—despite the classic justification of judicial review as necessary to the proper resolution of disputes[104]—the Court's primary focus was not on resolving the specific dispute before it, but rather on articulating the relevant norm.

This suggests a second theme in the Court's practice of judicial review that has long captured the attention and imaginations of commentators: the relationship between the Court's interpretation of the Constitution and the processes of religious interpretation. There is a growing and vital literature that discusses—and, sometimes, argues quite vehemently over—the legitimacy of a particular interpretivist stance,[105] often invoking parallels to theological stances and disputes.[106] On the other side, traditionalists of varying hues dis-

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of stunning simplicity." Winter, *A Setback for Deadly Force* (Op-Ed), N.Y. Times, Apr. 11, 1985, at A27, col. 3.

100. *Garner*, 105 S. Ct. at 1707.

101. 436 U.S. 658 (1978).

102. Reply Brief for Petitioner in No. 83-1070 at 3-4.

103. Garner v. Memphis Police Department, 600 F.2d 52, 53 (6th Cir. 1979); Garner v. Memphis Police Department, Civil Action No. C-75-145, Memorandum Opinion and Order, slip op. at 6-7, 9-10 (W.D. Tenn. Sept. 29, 1976).

104. *See Marbury*, 5 U.S. (1 Cranch) at 178; Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 6 (1959).

105. *See, e.g.*, Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740-41 (1982) (charging Professors Brest and Levinson with "nihilism"); *see also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Levinson, *infra* note 106).

106. *See, e.g.*, Grey, *supra* note 35; Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1957); Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123; Mason, *The Supreme Court: Temple and Forum*, 48 YALE L.J. 524 (1959); *see also* Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970), *reprinted in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 401 (N. Dorsen ed. 1971). Professor Amsterdam compared the role of the Supreme Court to that of the Pythia or priestess of the Oracle at Delphi:

> This young maiden was periodically lashed to a tripod above a noisome abyss, where her god dwelt and from which nauseating odors rose and assaulted her. There, the god entered her body and soul, so that she thrashed madly and uttered inspired, incomprehensible cries. The cries were interpreted by the corps of professional priests

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pute the religious metaphor and argue that the interpretation of the Constitution as a legal document requires adherence to formal rules and legal convention.[107]

For the purposes of this discussion, the salient aspect of this commentary is not the "correctness" or legitimating power of the religious metaphor, but its curious persistence. Its roots lie deep in our constitutional history. As has been pointed out,[108] Thomas Paine suggested that we frame a charter and crown it king;[109] John Marshall invoked the metaphor in describing "America, where written constitutions have been viewed with so much reverence,"[110] and described the alternative as legislative "omnipotence."[111] De Tocqueville described the process of judicial review not as voiding unconstitutional legislation, but rather as censuring it and diminishing its moral force.[112] And, despite his well known opposition to *Dred Scott*,[113] President Lincoln early in his career described "reverence for the laws" as the "political religion of the nation."[114]

Even the interpretivists who argue that constitutional adjudication must recognize the specifically legal nature of the document, and thus the legal conventions in interpretation, acknowledge the special power of the religious metaphor. "Perhaps these religious metaphors capture something special about expounding 'a *constitution*' that goes beyond the complexity of the constitu-

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of the Oracle, and their interpretations were, of course, for mere mortals the words of the god.

On its tripod atop the system of American criminal justice, the Supreme Court of the United States performs in remarkably Pythian fashion. Occasional ill-smelling cases are wafted up to it by the fortuities of litigation, evoking its inspired and spasmodic reaction. . . . The significance of the Court's pronouncements—their power to shake the assembled faithful with awful tremors of exaltation and loathing—does not depend upon their correspondence with reality. Once uttered, these pronouncements will be interpreted by arrays of lower appellate courts, trial judges, magistrates, commissioners and police officials. *Their* interpretation of the Pythia, for all practical purposes, will become the word of god.

To some extent this Pythian metaphor describes the Supreme Court's functioning in all the fields of law with which the Court deals. . . .

. . . .

By what I have said so far, I do not mean to suggest that Supreme Court decisions . . . are unimportant. Like the Pythia's cries, they have vast mystical significance. They state our aspirations. They give a few good priests something to work with. They give some of the faithful the courage to carry on and reason to improve the priesthood instead of tearing down the temple.

Amsterdam, *supra*, at 785-86, 793 (emphasis in original).

107. Fiss, *supra* note 105, at 750-55; Grey, *supra* note 106, at 13-17.

108. Grey, *supra* note 35, at 17-18.

109. T. PAINE, COMMON SENSE AND OTHER POLITICAL WRITINGS 32 (N. Adkins ed. 1952).

110. *Marbury*, 5 U.S. (1 Cranch) at 178.

111. *Id.*

112. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (1835).

113. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

114. *Quoted in* Levinson, *supra* note 106, at 124.

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tional context and the high stakes at issue in constitutional controversy."[115]

Indeed, they do. The aptness and persistence of the religious metaphor stems, in my view, from the functional similarity of religion to the process of constitutional adjudication. Here I have in mind not the parallel of unifying symbolism described so well by others,[116] although that too is important. Rather, it is the functional similarity in terms of the processes discussed so far that illustrates the continuing vitality of the metaphor.

Nothing distinguishes religion from other forms of social organization so much as the explicit emphasis on moral values and their role in structuring human behavior. What makes the Constitution like scripture and its interpretation akin to hermeneutics is the role that values inevitably play. This is so regardless of the mode of interpretation adopted; even the "strict constructionist" seeking the "original intent" cannot avoid an excursion into values, albeit those of the Framers, in an effort to ascertain the meaning of value-laden terms like unreasonable searches and seizures,[117] due process of law,[118] cruel and unusual punishment,[119] or equal protection of the laws.[120] In writing a constitution, the Framers were engaged in nothing so much as an effort to protect certain values; the Constitution was formed "in Order to . . . establish Justice . . . and secure the Blessings of Liberty . . . ."[121]

> Those who wrote and ratified the Bill of Rights had been through a revolution and knew that times change. They were embarked on a perilous course toward an uncertain future and had no comfortable assurance what lay ahead. To suppose they meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas

115. Grey, *supra* note 106, at 17.

116. *Id.* at 21-22; Levinson, *supra* note 106, at 123-25, 150.

117. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 630 (1886) ("The principles . . . reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctities of a man's home and the privacies of life.")

118. Learned Hand characterized constitutional provisions like the due process clause as cast "in such sweeping terms that their history does not elucidate their contents." L. HAND, THE BILL OF RIGHTS 30 (1958); *see also* Haley v. Ohio, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring) ("But whether a confession of a lad of fifteen is 'voluntary' and as such admissible, or 'coerced' and thus wanting in due process, is not a matter of mathematical determination. Essentially it invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society."); *accord* Miller v. Fenton, 106 S. Ct. 445, 449 (1985) ("This Court has long held that certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause. . . .").

119. Weems v. United States, 217 U.S. 349, 373 (1910) ("a principle to be vital must be capable of wider application than the mischief which gave it birth").

120. *See* Brown v. Board of Education, 347 U.S. 483, 492 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted. . . ."); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63-65 (1955).

121. U.S. CONST. preamble.

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seems . . . implausible in the extreme.[122]

It is also worth remembering that the Framers believed in Natural Law[123] and "inalienable rights,"[124] concepts that speak of values and higher morality.

A system calling for the explication of values typically spawns an agency or class cultivated for the purpose. It is therefore entirely predictable that traditional defenses of judicial review have tended to focus on the institutional advantages of courts and the dispositional superiority of judges as explicators of national values. John Stuart Mill noted:

> [T]he peculiarity inherent in a Court . . . that its declarations are not made at a very early stage of a controversy, that much popular discussion usually precedes them; that the Court decides after hearing the point fully argued on both sides by lawyers of reputation. . . . Even these grounds of confidence would not have sufficed to produce the respectful submission with which all authorities have yielded to the decisions of the Supreme Court on the interpretation of the Constitution were it not that complete reliance has been felt, not only on the intellectual preeminence of the judges composing that exalted tribunal, but on their entire superiority over either private or sectional partialities.[125]

Similarly, Professor Bickel extolled the special capacity of courts

> for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society. . . .
>
> Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.[126]

These observations, like the religious metaphor, continue to echo in the current literature concerning judicial review.[127]

These perceptions of the judiciary are not confined to the commentators, but pervade popular practice and attitudes as well. We surround our courts with ritual and mystique and accord our judges, like a secular priesthood, with distinctive honor. Our judges are clad in robes and sit on high benches. We

122. Amsterdam, *supra* note 106, at 399.
123. Grey, *supra* note 35, at 715-16.
124. The Declaration of Independence para. 2 (U.S. 1776).
125. J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 242-43 (1861).
126. A. BICKEL, THE LEAST DANGEROUS BRANCH 25-26 (1962).
127. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 138, 162 (1980); Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 13 (1979).

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rise when they enter the court. They are addressed as "Your Honor," and one must seek their permission before one may approach. They are called upon to officiate at the holiest of occasions like a marriage or the swearing in of a new president.

Perhaps it is these public attitudes that account for the particularly American practice of judicial review and the reliance on the courts to resolve authoritatively even the most political questions.[128] Confidence in the courts runs deep; even though public opinion sometimes runs high against the substantive decisions of the Court, Supreme Court Justices continue to rank high in polls of public confidence.[129]

Indeed, the perception of the Court as expositor of values has so permeated our culture that it sometimes confounds the lawyers who practice before the Court. Recently, the Attorneys General of forty-three states and three territories filed a brief as amici curiae in *Evans v. Jeff D.*,[130] a case concerning negotiation of attorneys' fees in civil rights actions that raises issues of both legal ethics and statutory interpretation.[131] Their brief suggested that if the

128. 1 A. DE TOCQUEVILLE, *supra* note 112, at 280 ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

129. J. CHOPER, *supra* note 128, at 138.

130. 106 S. Ct. 1531 (1986).

131. *Evans v. Jeff D.* was a class action brought on behalf of adolescents in mental institutions in Idaho. The plaintiffs claimed that they were receiving inadequate treatment and that some of them were housed in dangerous conditions, such as on wards with adult sex offenders and child molesters. The defendants had conditioned their offer of settlement upon a waiver of the statutory attorneys' fees under 42 U.S.C. § 1988 (1976). The settlement offer would have provided the plaintiff class with substantial, if not complete relief. Counsel were thus put in a conflict of interest with their clients; their ethical duty to exercise independent judgment on behalf of the client class, MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 5, required them to accept the settlement offer and forgo the fee. In order to preserve their position, they negotiated a provision in the settlement that conditioned the fee waiver on the approval of the district court. Evans v. Jeff D., 106 S. St. 1531.

In the courts, plaintiffs' counsel argued that the fee waiver was coerced by the exploitation of their ethical duty to their clients and that, therefore, the waiver violated both the Code of Professional Responsibility and the statutory policy of section 1988 that fees be awarded in these cases. The district court ruled against the plaintiffs and the court of appeals reversed. Jeff D. v. Evans, 743 F.2d 648 (9th Cir. 1984). The Supreme Court reviewed the Ninth Circuit and reinstated judgment of the district court.

Some federal courts have upheld such waivers. *See, e.g.*, Moore v. National Assoc. of Sec. Dealers, 762 F.2d 1093 (D.C. Cir. 1985); Lazar v. Pierce, 757 F.2d 435 (1st Cir. 1985). The Third and the Ninth Circuits had barred simultaneous negotiations of fees and the merits to avoid such conflicts. Prandini v. National Tea Co., 557 F.2d 1015 (3rd Cir. 1977); *Jeff D., supra; see also* Lisa F. v. Snider, 561 F. Supp. 724 (N.D. Ind. 1983); Regalado v. Johnson, 79 F.R.D. 447 (E.D. Ill. 1978). Three bar associations have considered the matter under the Code of Professional Resonsibility and each concluded that the waiver offer is coercive and unethical. Committee on Professional and Judicial Ethics of the New York City Bar Association, Op. No. 80-94, *reprinted in* 36 REC. A.B. CITY N.Y. 507 (1981); District of Columbia Bar Legal Ethics Committee, Op. No. 147, *reprinted in* 113 DAILY WASH. LAW REP. 389 (1985); Grievance Commission of the Board of Overseers of the Bar of Maine, Op. No. 17 (1981). *See generally* Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 VILL. L. REV. 597 (1984); Comment, *Settlement Offers Conditioned*

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Court were to hold that a particular negotiation tactic does not violate the intent of the statute, that ruling would preempt state interpretations of their codes of legal ethics by operation of the supremacy clause.[132] Basic principles of federalism indicate the error of that position; state ethical codes may proscribe what federal statutes condone. The argument makes sense only if one conceives of the Court's condonation of the practice under the statute as morally legitimating; in that case, the value judgment of the supreme expositors could be understood to preempt the moral judgments of lesser agencies.

It should be stressed, therefore, that these conceptions of judicial priesthood point in a direction very different than do the doctrines described above. They point instead to a judiciary that articulates values free from the constraining influence of public opinion and mores. They suggest a hierarchical process that commands respect for the Platonic formulation of societal values.

The dichotomy between "oracular" and "democratic" value exposition does not divide neatly along a liberal-conservative axis. If a Court views itself as an oracle in determining societal values, it may declare conservative as well as liberal ones. An example is the interchange between the Burger Court and some of the more liberal state supreme courts in the criminal procedure area. Professor Tribe has highlighted the interchange in *Oregon v. Haas*.[133] The Oregon court declined to follow *Harris v. New York*[134] and instead held that statements elicited from a defendant after he had invoked his right to remain silent[135] could not be introduced as impeachment. The Supreme Court reversed, holding that "a State may not impose . . . greater restrictions . . . as a matter of *federal constitutional law* when this Court specifically refrains from imposing them."[136] Tribe's criticism suggests that because the rule of the Oregon court was not itself unconstitutional, it should not have been disturbed.[137] On that basis, he argues that reversal cannot be explained by the Court's invocation of the supremacy clause, but only by the *Cooper v. Aaron* notion of the Supreme Court as supreme expositor of the Constitution.[138]

In fact, the hubris of exposition extends beyond that in *Haas*. For that opinion at least recognized the authority of the state courts to impose more rigorous standards of criminal procedure as a matter of state law.[139] Since *Haas*, however, the Court has extended its reach. In *Michigan v. Long*,[140] the Court adopted a new rule for determining when a state court decision that

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upon Waiver of Attorneys' Fees: Policy, Legal and Ethical Considerations, 131 U. PA. L. REV. 793 (1983).

132. Brief for Alabama, et al. as Amici Curiae at 41-42 n.20, Evans v. Jeff D., No. 84-1288.

133. 420 U.S. 714 (1975).

134. 401 U.S. 222 (1971).

135. *See* Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).

136. Oregon v. Haas, 420 U.S. at 719 (emphasis in original).

137. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 31 (1978).

138. *Id.* at 31-32 ("It was thus the Oregon court's heresy, and not its action, that led to reversal. . . .").

139. *Haas*, 420 U.S. at 719.

140. 463 U.S. 1032 (1983).

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relies upon both state and federal law is shielded from review by the independent and adequate state ground rule: When it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground, the Court will assume that the state court "rested its decision primarily on federal law."[141]

In dissent, Justice Stevens echoed Professor Tribe's argument that there was no federal interest in restraining Michigan from overprotecting its citizens and imposing more restrictive rules on its police.[142] The majority's response spoke only to the interest in maintaining uniformity in the application of federal law by the state courts.[143] This, of course, is not fully responsive, since it does not explain why a disuniformity that overvalues the federal interest is of concern to the Court. The answer may well be that a Court which sees itself, like Justice Cardozo's common law judge, "as the interpreter for the community in its sense of law and order . . . ,"[144] is very much concerned when some other agency disagrees with the balance of values that it has struck. Indeed, in one case, the Chief Justice invited the voters in the states to overrule their supreme courts by referenda or state constitutional amendments whenever those courts require more than the Supreme Court in areas of criminal procedure.[145]

III

GARNER AND THE INUTILITY OF HISTORY

Before returning to the questions raised by interpolation of values through the medium of judicial review, it may be helpful to make a short detour to touch upon the relevance of history. Because *Garner* concerned an historic practice known at the time of the Framers, it would seem to present an excellent opportunity to engage in a "jurisprudence of original intent," saving the courts from the "undemocratic" exercise of exposition and imposition of values. Appearances, however, deceive.

The Court rejected the historical approach: "Because of sweeping change in the legal and technological context, reliance on the common-law rule in this case would be a mistaken literalism that ignores the purposes of a histori-

141. *Id.* at 1042.

142. *Id.* at 1067-68 (Stevens, J., dissenting).

143. *Id.* at 1042 n.8 (majority opinion).

144. B. CARDOZO, *supra* note 90, at 16. The same phenomenon can be seen in Young v. United States, 315 U.S. 257 (1942). In *Young*, the Court declined to accept unexamined the Solicitor General's confession of error in a federal criminal case. It accepted, even extolled, the Solicitor's duty to confess error in the interest of justice. "But such a confession does not relieve this Court of the performance of the judicial function. . . . [O]ur judicial obligations compel us to examine independently the errors confessed. . . . The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection. . . ." *Id.* at 258-59 (citations omitted); *see also* A. CAMUS, THE FALL 18, 41 (1956).

145. Florida v. Casal, 462 U.S. 637, 639 (1983) (Burger, C.J., concurring in the dismissal of the writ of certiorari as improvidently granted).

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cal inquiry."[146] Without pausing to explain the proper purposes of an historical inquiry, the Court explained that the common law rule known to the Framers authorized the shooting of a suspect liable for the death penalty, since virtually all felonies were, at that time, capital offenses. This meant that the common law doctrine authorized only a consequence no greater than what would have ensued upon capture. Moreover, it authorized only the killing of those reasonably presumed to be dangerous—since for the most part common law felonies concerned crimes of violence and, in any event, a suspected capital felon could be expected to use force to escape his fate.[147]

Similarly, the common law rule developed when weapons were rudimentary. As a practical matter, deadly force could be inflicted in a hand-to-hand situation;[148] in that event, the fleeing felon doctrine was consistent with the officer's privilege of self defense in the lawful exercise of his duty. This historical reality was reflected in the 1858 Tennessee statute at issue in *Garner*, which was entitled "Resistance to Officer" and authorized the use of force necessary "to effect [an] arrest" when suspects "flee or forcibly resist. . . ."[149]

Thus, history revealed very little about what the Framers would have thought about shooting a nondangerous fleeing suspect who had taken ten dollars and who, if captured, would have been subject only to treatment as a juvenile.[150] If either proportionality or self defense justified the common law rule, then history counseled rejection of the modern version of the fleeing felon doctrine. At the least, history was uninstructive; at worst, its application would have led to a quite arbitrary rule that allowed the killing of nonviolent felony suspects, but prohibited the shooting of more dangerous misdemeanants like drunken drivers.[151]

In this connection, *Garcia v. San Antonio Metropolitan Transit* is again instructive. Rejecting the historical state immunity doctrine, the Court noted the inutility of history in terms equally applicable to *Garner*: "The most obvious defect of a historical approach . . . is that it prevents a court from accomodating changes. . . . At the same time, the only apparent virtue of a rigorous historical standard, namely, its promise of a reasonably objective measure . . . is illusory."[152]

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146. *Garner*, 105 S. Ct. at 1702.

147. *Id.* at 1702-03.

148. *Id.* at 1703.

149. TENN. CODE ANN. § 40-7-108 (1982).

150. Edward Eugene Garner was only fifteen when he was killed. Under Tennessee law applicable at the time, a child under sixteen was typically treated as a juvenile and could only have been adjudicated a delinquent. TENN. CODE ANN. § 37-102 (1977), repealed by Acts 1982 (Adj.S.), ch. 934, § 14. Although there was a provision for the transfer of juvenile suspects to the adult courts, ordinarily transfer was limited to those who were at least sixteen. TENN. CODE ANN. § 37-234 (1977), amended, Acts 1982, (Adj.S.) ch. 637, § 5. Fifteen-year-olds could only be transferred to an adult court if charged with one of the violent offenses enumerated in the statute; burglary was not one of those offenses. *Id.*

151. *Garner*, 105 S. Ct. at 1703 n.12.

152. *Garcia*, 105 S. Ct. at 1014.

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IV
VALUES AND JUDICIAL REVIEW

I do not propose to extrapolate from these observations a theoretical defense of judicial review or judicial norm articulation. Such an exercise is beyond the scope of this article. My primary inquiry has thus far been phenomenological; I have attempted to describe what the Court does in fact, not to justify it in theory. Nevertheless, some tentative conclusions are in order.

First, it is evident that the Burger Court is most typically engaged in a very conservative variety of judicial review. Thus, while *Garner* may look like a Warren Court decision, it is in reality made of very different stuff. Like its predecessor, the Burger Court continues to engage society in a dialogue about basic values. But its role is more deferential, more reactive, more reflective than imaginative.[153] The difference between the Warren and Burger Courts could be described this way:

> Under a particularly activist view, the judiciary spearheads social development by perceiving the need for social change well before that need is recognized by most members of society and by subjecting the masses to norms espoused by advanced social thinkers at the earliest moment that popular acceptance becomes possible. Under a less activist view, the judiciary is more of a follower than a leader, functioning to ensure that recalcitrant elements in society keep pace with social developments that have already been guided down the path of majority acceptance by other social institutions.[154]

In either form, what is most salient is the importance of the dialogue between the Court and society over the content of our norms and deepest values. Dialogue is instrumental in maintaining the quality of the process of norm articulation and the resulting norms. It also increases the legitimacy of that process. A Court unconstrained by societal judgments in the explication of values would be insufferably undemocratic. Conversely, a society that left the articulation and development of its values solely to the partisan political process and the expedience of governance would risk moral enfeeblement. By raising the process from the unconscious and unspoken to the articulated and dialogical, we achieve a significant advance over the dangers of the ad hoc and the questionable legitimacy of value imposition.

To be sure, there is the question of the forms this dialogue will take and the parameters that will govern it—that is, the proper balance between these mutually constraining factors of judicial value exposition, on the one hand, and, on the other hand, the democratic determination of policy through the

153. While this Court may be more deferential in its assessments, it is, nevertheless, no less confident of the rectitude of its vision of society and its values than was its predecessor. Thus, it is no less insistent about compliance with those conclusions. *See, e.g., Haas*, 420 U.S. 714.

154. Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 600 n.59 (1983).

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political process. This, of course, has always been the core problem of judicial review. The introduction of a more explicit normative dialogue, however, operates powerfully and positively to engage these opposing elements in an embrace— both mutually nourishing and constraining. If the shape of that relationship has yet to be developed, the model shift is nevertheless an advance. The task of elaboration will require the identification not just of the proper occasions for judicial exposition,[155] but also the continued development of the legitimate sources and contents of the values that will and should fuel the engine of the process.[156] It will require a new vocabulary—that is, new forms of analytic and doctrinal justification such as are emerging in cases like *Payton* and *Bob Jones*. All this is the work of the future.

In the meantime, however, attacks from the right that focus either on the Court's interposition of values or on the alleged superiority of an historical approach cannot succeed on the theoretical grounds of greater democratic sensitivity. To the contrary, much of what the Court has been practicing has been exceedingly democratic. An historical approach, on the other hand, is less democratic. To the extent that even an historical approach necessarily entails judgment in exegesis, it threatens to impose values covertly in the guise of interpretation. To the extent that some "true" intent of the Framers is divined,[157] it imposes on the present the perhaps outdated and perhaps destructive value judgments of the past.[158] In either event, an historical approach fails to arrive at a democratic consensus. The Court's more open ended approach is democratically superior and, therefore, more legitimate.

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155. *See, e.g.,* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); J. Ely Democracy and Distrust (1980); Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713 (1985).

156. *See generally* R. Dworkin, Taking Rights Seriously (1984).

157. *Cf.* Amsterdam, *supra* note 77, at 398:

> [T]he . . . use of background history encounters the objection that it treats the framers as a collection of bodies having but one head; it assumes that from their common "living experience" they drew but one conclusion. As soon as the question becomes one of generalizing beyond a particular evil, this hypostatic conception of "the framers" becomes still more dubious; for generalization requires reference to the reasons for a prescription, and a variety of minds may agree upon a common prescription for a variety of reasons. When, in addition, the generalization is negative, the usefulness of seeking to construct the common thought of that variety of minds called "the framers" asymptotically approaches zero.

(footnotes omitted).

158. *See, e.g.,* Wechsler, *supra* note 104, at 19.

> I argue that we should prefer to see . . . the Bill of Rights read as an affirmation of the special values they embody rather than as statements of a finite rule of law, its limits fixed by the consensus of century long past, with problems very different from our own. To read them in the former way is to leave room for adaptation and adjustment if and when competing values, also having constitutional dimension, enter on the scene.

Accord Amsterdam, *supra* note 77, at 399 ("Nor do I see a reason to conclude that the framers intended . . . the Bill of Rights or the Constitution . . . to state a principle like the dwarf in Gunter Grass' *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him. Growth is what statesmen expect of a Constitution.").

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In considering this more explicitly expository approach, it is important to note that it is not different in kind from what judges have historically done: It is precisely the critical function identified by Cardozo as the role of the common law judge. It does not inevitably threaten the judicial autocracy of substantive due process; whether activist or deferential, a value articulating approach is necessarily constrained to some degree by public opinion. This says no more than history teaches.[159] As Professor Tribe argues:

> Most of the worry about how far judges may go, however genuine it may be and however fashionable it is again becoming, strikes me as rote unreality, profoundly misconceived in light of the inevitable social and cultural constraints on judicial intention and impact. Those constraints are perennially strong; they explain why the Supreme Court's decisions, even those universally rejected in a later era, may be controversial when they are rendered but never seem *unthinkable* at that time.[160]

Many are the examples of the proposition that "as constitutional statesmen, the justices must arrive at some ultimate accomodation with dominant opinion."[161]

Finally, *Garner* may be the most salutary form of judicial review. For in the articulation of worthy norms that are recognized as such and accepted by society, the Court serves both democracy and its own institutional legitimacy.

> [I]ts resonance [is] strengthened by the degree to which the Court does appear to retain the faculty both of educating a majority that has temporarily foresaken constitutional values and of calling for adherence to profound ideals. Since certain of the Court's rejection of popular will are perceived by the people and their representatives as legitimate and worthy acts of authority by the nonpolitical branch of government, some exercises of judicial review do earn public respect for the judiciary. Indeed, given the function that the Justices historically have assumed in our system, it may well be that if they were totally to abandon their role as educators and supervisors of the national conscience they would be regarded with disdain as much or more than if they were to seek to impose their personal views and so

159. At least by the thirteenth century, political philosophers recognized that even autocrats ruled to some degree only with the consent of the governed. *See* B. TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS FOURTEENTH CENTURY 325 (1978). There are many examples of the Court's modification of doctrine in the face of strongly adverse public opinion. *See infra* notes 162-63.

160. L. TRIBE, *supra* note 138, at iv (emphasis in original).

161. Westin, *Also on the Bench: "Dominant Opinion,"* in THE SUPREME COURT UNDER EARL WARREN 63, 71 (L. Levy ed. 1972); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); J. CHOPER, *supra* note 128, at 161. In this sense, the Warren Court was not so different from its successor. *Compare* Barenblatt v. United States, 360 U.S. 109 (1959), *with* Watkins v. United States, 354 U.S. 178 (1957); *see also* Harrington v. California, 395 U.S. 250 (1969); Terry v. Ohio, 392 U.S. 1 (1968).

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revise all legislative and executive policies.[162]

To the extent that *Garner* is an example of the articulation of a norm worthy of respect, and I believe that it is, it is an appropriate and legitimate exercise of the Court's power.

162. J. CHOPER, *supra* note 128, at 162 (noting attractiveness of theory quoted in the text, but questioning its completeness).

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