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I

The conventional wisdom on what liberals think about the Warren Court goes something like this: In the beginning there was the Warren Court and it was good. It desegregated the schools, reapportioned the legislatures, civilized the station house, unshackled the speech of dissidents, and stayed the hand of government in matters of reproductive choice. It called this constitutional interpretation. Then came the critics who called it legislation from the bench. The critics won the elections. They made all the appointments to the Court for a quarter of a century. The Warren Court was no more. And liberals retreated to the wilderness, celebrating the fading memory of the Warren Court and waiting for its time to come again.

Like any conventional wisdom, this one has partial truth. But it also overlooks entirely one of the most striking recent trends in constitutional scholarship. As conservatives attacked from without the notion of judicial supremacy in constitutional interpretation that is traditionally associated with the Warren Court, an array of liberal and progressive constitutional scholars lobbed their own critiques of this notion from within. Robert Burt's *The Constitution in Conflict* is the latest entry in this literature of progressive self-criticism.[1] Burt's central thesis is that judicial supremacy in constitutional interpretation violates a fundamental norm of equality that should govern social and political relations. In his view, the Court heeds this norm when it serves as a participant in constitutional dialogue rather than an oracle of constitutional truth. In short, conventional liberal worship of the Warren Court gets it wrong.

This thesis situates Burt squarely in what might be called the Protestant rather than the Catholic wing of liberal thought on how constitutional interpretation ought to be structured. I borrow this analogy, of course, from the evocative work of Sanford Levinson[2] and Thomas

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1. Robert Burt is the Southmayd Professor of Law at the Yale Law School.

2. *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

Grey.[3] For present purposes, the key aspect of this analogy is not the difference in approaches to text — Protestants look to text alone while Catholics look to both text and unwritten tradition[4] — but the difference in approaches to institutional interpretive authority — Catholics centralize interpretive authority in the Pope (Supreme Court) while Protestants decentralize or deinstitutionalize that authority.[5] Justice Jackson once said, in a kind of constitutional Catholic in-joke, that the Court is not final because infallible, but infallible because final.[6] Constitutional Protestants see the Court as neither infallible, final, or a Pope. As the Protestant-leaning Levinson recently put it, those who would bring about a constitutional Reformation must start with the " 'defetishization' " of the Court.[7]

How might one go about defetishizing the Court? First, one might devolve greater authority to interpret the Constitution upon the nonjudicial branches of government. On this view, the Court's interpretation is not hierarchically superior but competes on an equal footing with that of other branches. Supreme Court rulings bind the parties in a particular case, but they need not command executive or legislative acquiescence in the next one. President Reagan's Attorney General Edwin Meese took a lot of heat for asserting this view in a notorious 1986 speech.[8] But constitutional Protestants thought he had a point.[9] Jefferson, Jackson, Lincoln, and Roosevelt, after all, had each approved defiance of Supreme Court decisions they deemed profoundly

3. *See* Thomas C. Grey, *The Constitution as Scripture,* 37 STAN. L. REV. 1 (1984). In borrowing the terms "Catholic" and "Protestant," I mean no interdenominational offense. As Levinson and Grey pointed out in launching these terms into constitutional theory discourse, Judaism and Islam also split along lines of textual and institutional difference parallel to those dividing Christians. See LEVINSON, *supra* note 2, at 19-27.

Burt does not employ the terms "Catholic" and "Protestant" explicitly in his book. But, elsewhere in his work, he has invoked comparisons between constitutionalism and religion that suggest he might not entirely resist the metaphor here. *See* Robert A. Burt, *Constitutional Law and the Teaching of the Parables,* 93 YALE L.J. 455, 466-78 (1984); Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence,* 12 CARDOZO L. REV. 1685, 1690-93 (1991). Moreover, some evidence that the "Protestant" label may be appropriate comes from the fact that Sanford Levinson, an erstwhile constitutional Protestant himself, furnished an enthusiastic cover blurb for *The Constitution in Conflict,* praising Burt's "well-thought-out attack on the standard notion of judicial supremacy" and approving Burt's argument that the Constitution is "a communally interpreted document, in which the Court plays an important but not predominant role" (book jacket).

4. *See* LEVINSON, *supra* note 2, at 18-23, 30-37; Grey, *supra* note 3, at 3, 5-9.

5. LEVINSON, *supra* note 2, at 23-30.

6. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

7. Sanford Levinson, *Tiers of Scrutiny — From Strict Through Rational Bases — and the Future of Interests: Commentary on Fiss and Linde,* 55 ALBANY L. REV. 745, 747 (1992) (attributing this term to Frank Michelman).

8. Edwin Meese, *The Law Of the Constitution,* 61 TUL. L. REV. 979 (1987); *see* LEVINSON, *supra* note 2, at 39-46.

9. *See* LEVINSON, *supra* note 2, at 39-46; *see also* Sanford Levinson, *Could Meese Be Right This Time?,* 293 THE NATION 689, 704; Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment,* 61 TUL. L. REV. 1017 (1987).

wrong.[10] Of course, people disagree about when such defiance is appropriate and, if so, what form it should take.[11] But constitutional Protestants do not presume interbranch interpretive controversy to be unhealthy.

Second, and more radically, one might devolve greater authority to interpret the Constitution upon the citizenry at large. This approach reduces the importance of all institutional intermediaries in favor of popular mobilization and engagement. Individual citizens may confront the Constitution directly, like individual sinners contemplating their God without priests. For example, Robin West has argued that constitutional adjudication is inherently "authoritarian," "conservative," "hierarchic," "elitist" and "nonparticipatory"[12] — and therefore that constitutional discourse ought to be reclaimed by the citizenry acting in more participatory modes.

Those who sound such themes do not always agree on the citizenry's capacity for sustained constitutional engagement. Civic republican revivalists such as Cass Sunstein and Frank Michelman have sometimes seemed to assume that deliberative engagement by the citizenry can be more or less continuous.[13] Bruce Ackerman, in contrast, has suggested that citizens' energy for heightened deliberation on matters of constitutional import is limited, and he has therefore offered a "dualist" account in which "constitutional moments" of "higher lawmaking" alternate with the default program of "normal politics."[14] Despite these differences in detail, these scholars in common seek to relativize the conventional liberal distinction between politics and constitutional lawmaking. For them, rights are not trumps but just cards in the deck. In the words of Ronald Collins and David Skover, such approaches tend "to reunite constitutionalism with democracy."[15] Or, in Robin West's words, they seek to repose constitutional authority in " 'We the People' rather than 'They the Court.' "[16]

These techniques for unseating the Court from its papal throne in

10. *See* LEVINSON, *supra* note 2, at 38-42; GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 50-54 (2d ed. 1991). Jefferson's, Jackson's, Lincoln's, and Roosevelt's disagreements with the Court centered, respectively, on the constitutionality of sedition laws, the Bank of the United States, slavery, and laws altering the balance of power between labor and capital.

11. For example, declining to enforce a statute the Court has upheld may be less problematic than prosecuting under a law the Court has struck down. *Cf.* Laurence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms,* 91 HARV. L. REV. 1212 (1978).

12. Robin West, *Progressive and Conservative Constitutionalism,* 88 MICH. L. REV. 641, 714-15 (1990).

13. *See* Frank Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government,* 100 HARV. L. REV. 4 (1986); Cass Sunstein, *Beyond the Republican Revival,* 97 YALE L.J. 1539 (1988).

14. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6-7 (1991).

15. Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship,* 87 MICH. L. REV. 189, 235 (1988).

16. Robin West, *The Supreme Court, 1989 Term — Foreword: Taking Freedom Seriously,* 104 HARV. L. REV. 43, 106 (1990).

constitutional interpretation leave open the question of what, exactly, a nonsupreme Supreme Court is supposed to do. Robert Burt's *Constitution in Conflict* is an extended meditation on this question. Burt elaborates the institutional psychodynamic of Protestant constitutionalism: how the Court might internalize a communal rather than a hierarchical role.

II

Burt himself does not use the terms Catholic and Protestant to distinguish the ideal of judicial supremacy from the ideal of egalitarian judicial participation in constitutional dialogue. He organizes the distinction instead around archetypes he derives from American constitutional history, with Hamilton on one side and Madison and Lincoln on the other. Most of the book is devoted to a detailed historical account of the dialectic between these two archetypes. But the thrust of the book is unmistakably normative: Burt argues that the Madison-Lincoln approach is the better one.

The judicial supremacist vision of the Court that Burt deplores has prevailed ever since Hamilton in *Federalist 78* first located the Supreme Court atop a "hierarchical pyramid" within the national government.[17] In Burt's view, paradigmatic examples of the Supreme Court's wrongheaded Hamiltonian decisionmaking include *McCulloch v. Maryland,*[18] *Prigg v. Pennsylvania,*[19] *Dred Scott v. Sanford,*[20] *Lochner v. New York,*[21] and *Roe v. Wade.*[22]

What error did these various decisions have in common? Not any substantive error in constitutional interpretation but rather the institutional error of judicial arrogance. In each, the Court deemed itself the "hierarchically supreme, definitive interpreter[] of the Constitution" (p. 254). All of these decisions embodied "efforts to interpose judicial authority in order to suppress direct conflictual interaction among the contending parties" (p. 247). In each, the Court "fashioned a preemptive weapon" meant to silence dialogue between the opposing sides (p. 349). The result, as Burt characterizes it, was judicially coerced subjugation of one side to the other: "national government [triumphed] over the states in *McCulloch,* the southern slaveowners [over the slaves] in *Prigg* and *Dred Scott,* and the propertied few [over the laboring many]

17. P. 53 (citing THE FEDERALIST No. 78 (Alexander Hamilton)).

18. 17 U.S. (1 Wheat.) 316 (1819) (upholding congressional authority to charter a national bank and invalidating a state effort to tax it); *see* pp. 132-43.

19. 41 U.S. (1 Pet.) 539 (1842) (invalidating state attempt to bar rendition of fugitive slaves); *see* pp. 174-86.

20. 60 U.S. (1 How.) 393 (1857) (invalidating congressional effort to bar slavery from territories); *see* pp. 188-93.

21. 198 U.S. 45 (1905) (invalidating state statute limiting bakers' hours); *see* pp. 253-55.

22. 410 U.S. 113 (1973) (invalidating state criminal prohibition against abortion); *see* pp. 344-52.

in the Fuller Court decisions generally" (p. 247). *Roe* too "awarded total victory to one troop among the combatants" (p. 348).

Contrast all this with the judicial egalitarian vision that Burt associates historically with Madison and Lincoln and urges upon the modern Court. On this view, the Court should not seek "techniques for conclusively ending conflict" (p. 136) but instead should facilitate "political conversation" (p. 98) or "precipitate a process of collaboration and accommodation" (p. 131) that advances "the mutual empowerment of both disputants" (p. 267). The Court should coax disputants into "mutually arriv[ing] at a common characterization" (p. 98), not act as an "external locus of social control" (p. 97).

Burt attributes this judicial egalitarian approach originally to Madison. *Federalist 10* and *Federalist 51* argued for interior rather than exterior checks on government power through the technique of "dividing and then subdividing authority within and among the various institutions of governance."[23] Burt reads these texts to imply that the Court is " 'co-ordinate' with rather than hierarchically superior to the other federal branches in interpreting the Constitution."[24] On this view, social conflict is not to be siphoned off into courts but rather worked out in deliberative political forums where "alienated and potentially hostile rivals come to see one another as reciprocally connected fellow-citizens."[25]

Lincoln likewise had an "aversion to coercion" (p. 90), Burt argues. Given his "egalitarian conception of political relations" (p. 100), he preferred "persuasion" (p. 85) and "mutuality" (p. 90) to external force. On this reading, how can one explain Lincoln's command of the Union army in the Civil War? This might seem a "considerable paradox" (p. 85), Burt concedes. But according to Burt, even force can be true to the equality principle so long as it is merely defensively designed to restore the status quo ante another's aggression; this is "the only way that coercion can be justified within the democratic ethos" (p. 85). True to this approach, Lincoln aimed "only at the restoration of an equal, mutually consensual relationship" between North and South (p. 85). Lincoln's conception of the judicial role, like Madison's, was nonsupremacist. The Supreme Court's interpretations of the Constitution were fallible — *Dred Scott* was Exhibit A. If people deferred too much to " 'that eminent tribunal,' " Lincoln warned in his first inaugural address, they would " 'cease[] to be their own rulers' " (pp. 98-99).

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23. P. 60 (citing THE FEDERALIST NOS. 10, 51 (James Madison)).

24. P. 74. Jefferson Powell has challenged the historical accuracy of Burt's reading of Madison as an opponent of judicial supremacy. *See* H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197, 1205-11 (1993) (book review).

25. P. 96. In this respect, Burt's reading of Madison echoes the civic republican reading of Madison. *See* Sunstein, *supra* note 13, at 1558-64.

As paradigmatic examples of the Supreme Court's constitutional interpretation in the Madison-Lincoln mode, Burt cites *Marbury v. Madison*[26] and *Brown v. Board of Education.*[27] Burt reads both decisions in a revisionist light; neither, he says, stands for the assertion of judicial supremacy conventionally attributed to them. In *Marbury,* a "Madisonian Marshall" (p. 119) fended off the efforts of a Republican executive and legislature to "subjugate the judiciary" (p. 121) by declining to side decisively with the Federalist Marbury, thus cleverly "avoid[ing] a conclusive resolution of the dispute" (p. 125). He gave "room on all sides for recourse to negotiated settlement" (p. 128), which led Jefferson gradually to back off from attacking the Federalist-dominated Court (p. 131).

Likewise, Burt argues, *Brown v. Board* imposed a "stalemate" on the warring parties rather than awarding a conclusive victory to black Southerners over white (p. 293). Playing down the judicial supremacist rhetoric of *Cooper v. Aaron,*[28] Burt argues that *Brown* is the "central example" in our constitutional history of judicial egalitarianism toward the political branches (p. 3). Contrary to popular belief, *Brown* was *not* vindicated when federal troops escorted black students up the steps of Little Rock High — the scene depicted, perhaps ironically, in the cover photo of the book. Rather, the Court's cautious, interactive approach was vindicated nearly twenty years later when Congress passed, and the President signed, the Civil Rights Act of 1964 and related legislation (pp. 300-04). In Burt's view, the Court's call for "all deliberate speed" in the second *Brown v. Board of Education*[29] was not a cowardly capitulation to southern white resistance but rather a stroke of judicial egalitarian genius. The Court was self-consciously soliciting congressional and executive response that it would have stifled had it intervened more decisively in favor of black civil rights.

What prescription follows for the modern Court? Return to the Madisonian path, says Burt. *Roe v. Wade,* he suggests, is a textbook illustration of the evils of judicial supremacism: by "award[ing] total victory" to the prochoice side, the Court cut off "conversation" with opponents of abortion, thus licensing prochoice advocates to say to prolifers " 'I am entitled to ignore your distress' " (pp. 348-49). Far from ending polarized social conflict over the abortion issue, the Court merely fanned the flames. What would have been the better, Madisonian way? Let a patchwork of differing abortion regimes develop among the states and merely enforce pregnant women's right to interstate travel (pp. 350-51).

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26. 5 U.S. (1 Cranch) 137 (1803); *see* pp. 271-96.

27. 347 U.S. 483 (1954).

28. *See* 358 U.S. 1, 18 (1958) (holding that the Supreme Court's "exposition of the Constitution . . . *is* the supreme law of the land . . .") (emphasis added); *see* pp. 286-94.

29. 349 U.S. 294, 301 (1955).

Putting this same point more generally, Burt suggests that the Court should intervene in social conflicts not to confer victory on either side but rather to "assure that no combatant conclusively prevails over the other" (p. 359). How might it go about doing this? First, the Court should remove itself from sharp disputes over substantive questions, remanding them to the political branches via the Bickelian passive virtues: ripeness, mootness, standing, political question, and clear statement doctrine (pp. 359-62), or whatever else will invite what Bickel called a " 'continuing colloquy with the political institutions and with society at large.' "[30] Second, if the Court must reach the merits, Burt argues, it should use the balancing approach characteristic of "so-called 'middle-tier' constitutional scrutiny" (p. 362) rather than bright-line rules.[31] Such balancing "permits and even invites a legislative response" (p. 364) by employing "particularistic, contextually circumscribed, tentatively offered judicial interventions," a contrast with both "grand-style moral philosophizing" and mere "surrender to majority will" (pp. 367-68). On this view, decisions such as *City of Cleburne v. Cleburne Living Center, Inc.*[32] are steps in the right direction. Short of *Roe* never having issued in the first place, the "undue burden" test set forth in *Planned Parenthood v. Casey*[33] would presumably be Burt's idea of second best.

III

The Constitution in Crisis is a serious, thoughtful, and often insightful book. It undertakes a patient and detailed reconstruction of our constitutional history. It tries to map out a socially useful role for the Supreme Court in the face of our deep divisions and repeated tendencies to engage in "Manichean politics" and the "clash of moral absolutes" (p. 355). With such virtues to commend it, why did I find Burt's argument so unpersuasive?

One might be tempted to chalk up my resistance to a constitutional Catholic bias, to which I freely confess. But that is not the whole story. It seems to me that, even in Protestant terms, Burt's book does not make a clear case for so greatly diminishing the role of the Court in enforcing constitutional rights. There are two possible crises of faith that might drive the Protestant argument. The first is loss of faith that constitutional litigation at the Court can be an effective vehi-

30. P. 23 (citing ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 240 (1962)).

31. On this distinction in constitutional law generally, see Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22 (1992).

32. 473 U.S. 432 (1985) (declining to hold the mentally retarded a suspect class, but employing heightened rationality review to invalidate a city's exclusion of a group home for the mentally retarded from a residential neighborhood).

33. 112 S. Ct. 2791 (1992).

cle for bringing about social or political change. The second is loss of faith that the Court can articulate the content of constitutional rights. Burt seems little driven by the first and equivocal about the second.

Let us start with the first possibility: loss of faith in the Court. Some Court defetishizers come right out and admit that their turn from the Court is pragmatically motivated. As Robin West puts it, "necessity partly dictates this redirection of liberal energies."[34] She suggests that, after a quarter-century drought in Democratic nominations to the Court and decades of "adversely narrow judicial interpretation" of the Constitution,[35] anyone in her right mind would turn to cultivating social and political change in other forums. Such arguments draw support from recent social science literature suggesting that, even in its heyday, the Warren Court was never really much of a catalyst of social change. The leading example is Gerald N. Rosenberg's 1991 book, *The Hollow Hope: Can Courts Bring About Social Change?,* which answered mostly "no" to the question in its subtitle.[36]

At moments, Burt sounds a similar pragmatic concern about consequences. In this mode, he suggests that judicial supremacism can be politically counterproductive. For example, he adds his voice to the now fashionable chorus saying that, but for *Roe*'s "artless intervention" (p. 350), the political process inexorably would have lifted restrictions on abortion and we would not have antiabortion terrorists blocking abortion clinic doors today (pp. 348-52). Like any counterfactual, this can neither be proven nor disproven. But I strongly doubt whether politics alone would have outperformed *Roe* in advancing reproductive rights. First, this hypothesis ignores the culture-shaping effect of constitutional adjudication; once something has been held a right, it has clout in the political process that it would not have if it were called, say, a special interest.[37] Second, it is hardly clear that political talk would have done any more than judicial fiat to unsettle the deep convictions of those who condemn abortion as murder. Burt favors the optimistic view that American social relations are "amenable to peaceful compromise" (p. 259), but our recent national experience — consider not only abortion but also the debate over gay service members in the military — furnishes plenty of justification for Hobbesian pessimism. By underestimating the intractability of deeply held convictions, Burt undervalues the pragmatic attractiveness of supremacist courts.

Far more important to Burt than the pragmatic argument, how-

34. West, *supra* note 16, at 93.

35. *Id.*

36. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). For a review of *The Hollow Hope,* see Stephen L. Carter, *Do Courts Matter?,* 90 MICH. L. REV. 1216 (1992) (book review).

37. *See, e.g.,* LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 193-94 (1990) (arguing that *Roe* begat the prochoice political movement, not the other way around).

ever, is his apparent philosophical skepticism toward constitutional rights. Lack of foundations troubles him more than loss of Court seats. This is most evident from the "equality principle" he makes the linchpin of the book.

This principle arises out of what Burt calls "an internal contradiction in democratic theory between majority rule and equal self-determination" (p. 29). In a democracy of equals, the only legitimate decisions are those produced by unanimity, or "mutual consent" (p. 101). "[C]oercion in any form is the enemy of democratic life" (p. 375). Burt defines "coercion" exceptionally broadly: "coercion can occur on the battlefield, in a legislature, or in a courtroom," whether by "force of arms," "by majority vote or by judicial override on behalf of the previously defeated minority" (p. 29). In all three settings, the losing party has been "coerc[ed]," "subjugat[ed]," or "enslav[ed]" (pp. 28-29, 235, 282-83).

This is a very idiosyncratic definition of coercion. It is at odds with any conventional understanding of constitutionalism. In labeling majority rule and judicial review "coercion," Burt flies in the face of three centuries of social contract theory maintaining that ex ante precommitment to constitutional procedures precludes ex post sour grapes about particular outcomes.

If not from the Constitution, where does Burt's equality principle come from? Apparently from an elementary psychological model to which Burt would reduce all social conflict: "[I]magine you, me and a third person in the same room. Two of us decide that you should give your life to serve us"; if "we" win, then "you" will feel "enslave[d]" (pp. 27-28). Burt implies that if "you" convinced a court to enjoin "us," then "we" too would feel "enslaved." "No matter who wins, the principle of self-rule is defeated" (p. 29).

By reducing all constitutional antagonists to repeat players in this elementary drama, Burt forecloses the possibility of normative judgment about which claims to subjugation are better. To Burt, all players are equal candidates for the experience of subjugation, because that experience is in the eye of the beholder. Thus, slavery "subjugat[ed]" slaves, but the Civil War and Reconstruction likewise "subjugat[ed]" former slaveholders (p. 77). Jim Crow laws "subordinated" black Southerners, but overturning Jim Crow would "subordinate[ ]" white Southerners (p. 19). Blacks and whites, the Court and the President, the national government and the states, Federalists and Republicans, advocates for and against reproductive choice — each can "subjugate" the other at any time.

One need not be a moral realist to think that constitutional antagonists are not so morally fungible. Some feelings of unequal treatment may be better legitimated against some backdrop cultural understanding of subjugation than others. Just because losers feel subordinated

does not mean that they are right. Bakke[38] might feel just as much the victim of race discrimination as Plessy,[39] but a coherent account of equal protection may be given to explain why Plessy's feelings are justified and Bakke's are not. By universalizing the concept of subjugation, Burt treats powerful and pariah as equivalent.

Burt's value skepticism, in any event, founders on an internal consideration. Although he suggests that constitutional judgment rests "wholly on the subjective evaluations of the social disputants themselves" (p. 97), such subjectivism is belied by the central moral command of the book: "thou shalt not subjugate." Burt cannot simultaneously deny all objective values and affirm this one as the ultimate trump.

If Burt is not, after all, a value skeptic, perhaps he is simply a judge skeptic — arguing not that there are no values but only that the Court is institutionally inferior to the contending parties at articulating them.[40] On this view, the Court plays as psychotherapist — it can facilitate agreement, but the contending parties really have to want to change. This is a far thinner role for the Court than the already thin role assigned it by Burt's acknowledged intellectual progenitor, Alexander Bickel.[41] Like Bickel, Burt sees the Court as a participant in an ongoing and interactive dialogue with other political institutions and society at large. But if Burt is skeptical about the Court's competence to articulate constitutional rights, it is unclear why it should have even this thin role. Bickel at least thought that the Court, given its political insulation and its professional culture, had a real comparative advantage at talking. In Burt's vision, it is no longer clear why, when the Court talks, anyone should listen to it more than to anyone else.

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38. *See* University of Cal. Regents v. Bakke, 438 U.S. 265 (1978).

39. *See* Plessy v. Ferguson, 163 U.S. 537 (1896).

40. Jefferson Powell shrewdly links this aspect of Burt's argument to the proceduralist ethics of Richard Rorty. *See* Powell, *supra* note 24, at 1215-17.

41. *See* pp. 20-33.