The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review

Erwin Chemerinsky*

I. Introduction

The current obsession of constitutional law scholarship—whether activist judicial review can be reconciled with democratic theory—is hardly new. The controversy has reemerged as a result of attacks by conservative critics on recent Supreme Court decisions that protect rights neither mentioned in the Constitution's text nor intended by its Framers. Judges and scholars such as William Rehnquist, Robert

* Associate Professor of Law, University of Southern California Law Center. B.S. 1975, Northwestern University; J.D. 1978, Harvard University. My work on this Article was greatly aided by the comments and suggestions of many friends and colleagues. I especially want to thank Robert Bennett, Scott Bice, Louis Kaplow, William Marshall, Marlene Nicholson, Jeffrey Shanan, Stephen Siegel, Larry Simon, Marc Strauss, and the participants in the U.S.C. Law Center faculty workshop at which an earlier draft of this paper was presented.


2. As Dean Choper points out, "Reconciling judicial review with American representative democracy has been the subject of powerful debate since the earliest days of the Republic." J. Choper, Judicial Review and the National Political Process 4 (1980). See, e.g., L. Goldberg & E. Levenson, Lawless Judges (1935); Black, The Supreme Court and Democracy, 50 Yale L.J. 188 (1941); Commager, Judicial Review and Democracy, 19 Va. Q. Rev. 417 (1943); McCleary, Judicial Review in a Democracy: A Dissenting Opinion, 3 Hous. L. Rev. 354 (1946); Rostow, The Democratic Character of Judicial Review, 66 Harv. L. Rev. 193 (1952); Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. (1893); Wright, The Role of the Supreme Court in a Democratic Society, 54 Cornell L. Rev. 1 (1968).

3. Although there is general agreement that the debate over the legitimacy of judicial review has intensified, there is no consensus over why it is occurring now. Some see it as a response to the activism of the Warren Court. See, e.g., Benedict, To Secure These Rights: Rights, Democracy, and Judicial Review in the Anglo-American Cultural Heritage, 42 Ohio St. L.J. 69, 69 (1981) ("As the Warren Court's activism spilled into ever more areas . . . the problem of reconciling judicial review with democratic policymaking became the major focus of attention."). Other commentators link the controversy over judicial review to specific decisions, most notably Roe v. Wade, 410 U.S. 113 (1973), which legalized abortion on demand. See, e.g., Meeks, Foreword, 42 Ohio St. L.J. 1, 2 (1981) ("I believe that the current interest in judicial review can be traced rather directly to Roe v. Wade."). Still others see the current debate as the continuation of a controversy that has been underway for years. See, e.g., Berns, Judicial Review and the Rights and Laws of Nature, 1982 Sup. Ct. Rev. 49 ("The current controversy over the proper role of the judiciary can be said to
Bork, and Raoul Berger have argued that the principle of majority rule is sacrificed if judicial decisions are based upon values that are not stated or implied in the Constitution. They claim that democracy requires unelected judges to defer to the decisions of popularly elected officials unless there is a clear violation of rights protected by the Framers of the Constitution.

A number of prominent scholars have responded to this attack on the legitimacy of judicial review with theories designed to reconcile the Court's activist decisions with majority rule. Commentators such as Jesse Choper, John Hart Ely, and Michael Perry accept the premise of the critics of judicial review—that decisions in a democracy must be made by electorally accountable officials—but maintain that their theories demonstrate why the Court can act to protect values not explicitly mentioned in the Constitution. These authors' works have spawned numerous responses and even symposia examining whether judicial activism is appropriate in a democratic society. The controversy has been characterized as a debate between the "interpretivists," who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and the "noninterpretivists,"

have begun 20 years ago with Herbert Wechsler's appeal for Supreme Court decisions resting on neutral principles of constitutional law.


5. See R. Berger, supra note 4, at 410 (arguing that "[t]he respect for the limits on [judicial] power are the essence of a democratic society"); Bork, supra note 4, at 6 (noting that "a court that makes rather than implements value choices cannot be squared with the propositions of a democratic society"); Rehnquist, supra note 4, at 695-96 (noting that "the ideal of judicial review has basically antidemocratic and antiamajoritarian facets that must be justified in this Nation"); see also Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 Wayne L. Rev. 1, 7 (1981) (federal judiciary should not "constitutionalize moral values or principles of justice not fairly inferable from the written Constitution's text or structure"); Posner, The DeFunes Case and the Constitutionality of Preferential Treatment of Racial Minorities, 1974 Sup. Ct. Rev. 1, 28 (noting that "[t]he new realism about the political process calls for a reexamination of the role of a constitutional court.


9. J. Ely, supra note 7, at vii (claiming that his theory "is consistent with . . . the underlying democratic assumptions of our system"); M. Perry, supra note 8, at 10 ("[M]y strategy is not to reject the principle [of electorally accountable policymaking] but, on the contrary, to accept it as a given and then to defend judicial review—in particular constitutional policymaking—as not inconsistent with the principle"); Choper, The Supreme Court and the Political Branches: Democratic Theory and Practice, 122 U. Pa. L. Rev. 810, 815 (1974) ("[T]he procedure of judicial review is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom.").

who believe that the Court may protect norms not mentioned in the Constitution’s text or in its preratification history.\textsuperscript{11}

I contend that this inquiry into the legitimacy of judicial review is futile and dangerous. The inquiry is futile because, if democracy is defined to require that all value choices be made by electorally accountable officials, then noninterpretive judicial review by definition is not acceptable in a democracy. The inquiry is dangerous because it accepts the conservative critics’ definition of democracy and thereby legitimizes their premise that judicial review is unjustified unless it is made consistent with majority rule.\textsuperscript{12} The inevitable failure to reconcile noninterpretive court review with this definition of democracy undermines the legitimacy of countless Supreme Court decisions,\textsuperscript{13} including those protecting privacy,\textsuperscript{14} desegregating schools,\textsuperscript{15} upholding the rights of women,\textsuperscript{16} safeguarding freedom of speech,\textsuperscript{17} and requiring that states comply with the Bill of Rights.\textsuperscript{18}

The contention that judicial review is undemocratic is disingenuous at best.\textsuperscript{19} None of the critics of the Supreme Court’s activism suggests that all judicial review should be eliminated. Yet, any judicial decision that overturns a policy enacted by a popularly elected legislature is antiamajoritarian; even judicial review based on the intent of the Framers is, by the critics’ criteria, undemocratic. The interpretivists’

\textsuperscript{11} See J. ELY, supra note 7, at 1; Saphire, Judicial Review in the Name of the Constitution, 8 U. DAYTON L. REV. 745, 746 (noting that “[w]e have witnessed the polarization of constitutional theory into two camps: interpretivism and noninterpretivism”). Although I will argue that the terms “interpretivism” and “noninterpretivism” are misleading and should be discarded, \textit{see infra} text accompanying notes 169-207, I will use them until I establish this proposition.

\textsuperscript{12} Cf. Tushnet, The Dilemmas of Liberal Constitutionalism, 42 OHIO ST. L.J. 411, 411 (1981) (development of “Grand Theories” are attempts to save active judicial review).

\textsuperscript{13} Even most noninterpretivists tend to agree that interpretivist theory can justify few recent Supreme Court decisions that protect individual liberties. \textit{See}, e.g., J. CHOPER, supra note 2, at 137; M. PERRY, supra note 8, at 2.

\textsuperscript{14} See Bork, supra note 4, at 8-9 (claiming that the constitutional protection of privacy cannot be justified under an interpretivist theory). For notable decisions protecting privacy, see Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{15} See M. PERRY, supra note 8, at 2.

\textsuperscript{16} See Trimbble v. Gordon, 430 U.S. 762, 777-86 (1977) (Rehnquist, J., dissenting) (arguing that the fourteenth amendment was intended only to protect racial minorities). For notable decisions that concern gender discrimination and the fourteenth amendment, see Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

\textsuperscript{17} See Kurts, The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses, 29 DRAKE L. REV. 1, 12 (1979) (virtually all recent first amendment decisions go beyond the Framers’ intent).

\textsuperscript{18} See Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding, 2 STAN. L. REV. 5 (1949) (arguing that the Framers of the fourteenth amendment did not intend to apply the Bill of Rights to the states).

\textsuperscript{19} \textit{See infra} subpart III(A).

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only justification for allowing even limited judicial review is that it is functionally necessary to uphold the Constitution.\textsuperscript{20} If a functional justification for interpretivism is sufficient to outweigh the principle of majority rule, however, then a functional justification should be sufficient also to sustain noninterpretivism.\textsuperscript{21} Because the interpretivist critics are willing to sacrifice majoritarian principles to achieve their goals, their reliance upon democratic theory as the basis for their attack on noninterpretivism is both inconsistent and hypocritical.\textsuperscript{22}

The real question for debate is how much discretion the Court should have in interpreting the meaning of the Constitution. This is an inquiry that can be answered and that is much different from the question of whether judicial review can be reconciled with majority rule. Unfortunately, the question of the degree of judicial discretion has been obscured by the focus on majority rule and by the use of the misleading labels “interpretivism” and “noninterpretivism.”\textsuperscript{23} To clarify the debate over the proper scope of Court review, it is necessary to identify the possible approaches to judicial discretion and to develop criteria for evaluating the various alternatives.\textsuperscript{24} It is essential also to recognize that a purely procedural definition of American democracy as majority rule is grossly incorrect. A correct definition of American democracy must add to majority rule the protection of substantive values from tyranny by social majorities—an addition with crucial implications for the debate over the legitimacy of judicial review.

Finally, an examination of the literature on judicial review reveals that it focuses upon criteria that are of little use in evaluating theories of judicial discretion.\textsuperscript{25} This Article argues that it is pointless to evaluate models of judicial discretion in terms of their ability to yield determinate answers, to prevent “judicial tyranny,” or to enhance the credibility of the Court. All approaches to judicial discretion, interpretivist and noninterpretivist alike, are equally indeterminate, equally prone to abuse, and equally likely to cost the Court its legitimacy. In describing the appropriate questions to ask in selecting a model for judicial review, this Article suggests that the choice must be based upon substantive values, upon a political theory that examines how our government should be structured and identifies which values are so important that they must be shielded from majority rule.

\textsuperscript{20} See infra text accompanying notes 156-59.
\textsuperscript{21} See infra text accompanying notes 160-61.
\textsuperscript{22} See infra subpart III(A).
\textsuperscript{23} See infra text accompanying notes 169-207.
\textsuperscript{24} See infra text accompanying notes 174-95.
\textsuperscript{25} See infra subpart IV(A).
Countless articles have been written on this topic. This Article attempts to clarify the relevant questions upon which scholars should focus in evaluating the legitimacy of judicial review. Although those who oppose judicial activism are unlikely to accept my ultimate conclusions, I hope to shift the ground of future debate and to focus attention on questions that can be answered.

II. No Answer Is What the Wrong Question Gets

A. The Question Asked

If all provisions of the Constitution were unambiguous, constitutional interpretation would pose no difficulty. Few argue that clear constitutional provisions should be disregarded. The problem of constitutional interpretation arises because a number of key clauses are vague and open-ended. The Constitution is replete with phrases such as “due process of law,” “equal protection of the laws,” “privileges or immunities of citizens,” “liberty,” “unreasonable searches and

26. As Sanford Levinson notes:
It is unlikely . . . that any of the participants in the debates about constitutional theory are going to have their minds changed by reading a polemic by a person of another sect, any more than Baptist theologians are likely to convert to Catholicism or vice versa when presented with a “refutation” of the other’s position. Levinson, The Constitution in American Civil Religion, 1979 Sup. Ct. Rev. 123, 150. This Article does not attempt to defend any model for judicial review. Rather, its goal is to outline what the debate should be about. In a future paper, this author hopes to develop a normative theory that defends an “open-ended modernism” model. Even those who disagree with this Article over which approach the Court should use at least might be persuaded as to what the debate should be about.

28. There are, of course, many unambiguous provisions in the Constitution, such as the age limitations for representatives, senators, and the president, U.S. Const. art. I, §§ 2-3; id. art. II, § 1; the limitations on length of terms in office, id. art. I, §§ 2-3; id. art. II, § 1; and the age limitations on the right to vote, id. amend. XXVI.

29. A distinction is drawn between value judgments that go beyond the Constitution and those that go against the Constitution. The latter, termed “contraconstitutional” judgments, have not received significant scholarly attention. See M. PERRY, supra note 8, at ix. This distinction may not be useful. Even “clear” constitutional provisions might be ignored through interpretation. For example, the constitutional provisions setting minimum ages for the president, senators, and representatives might be interpreted as denying equal protection and thus subject to the fifth amendment. All constitutional provisions, even seemingly unambiguous ones, present questions of interpretation and make the distinction between extraconstitutional and contraconstitutional interpretation problematic.

30. If the Constitution were clear, there would be relatively little need for judicial review because, as Professor Tushnet explains, “legislators accept some, though perhaps minimal, responsibility for fidelity to the Constitution. To the degree that a constitutional command is clear, a majority of legislators is probably unwilling to contravene it.” Tushnet, Darkness at the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 Yale L.J. 1037, 1042 (1980).

31. U.S. Const. amend. V, XIV.
32. Id. amend. XIV.
33. Id. amend. XIV.
34. Id. amend. V, XIV.

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seizures,"35 "freedom of speech,"36 and others.37 As a result, the central questions in constitutional law are who should give meaning to these provisions and how should this be done.

Judges and scholars who approach these questions face a dilemma. On one hand, allowing the Court the discretion to interpret these provisions and to strike down legislative actions based on their interpretations arguably violates the democratic principle of majority rule.38 If democracy is defined in purely procedural terms as a requirement that only electorally accountable officials may make decisions,39 judicial review is undemocratic in two ways. First, the Supreme Court obviously is not a democratic institution according to this definition of democracy, because the Justices have lifetime appointments and are not directly accountable to the electorate.40 Second, Court action thwarts the will of the majority by overruling policies enacted by officials who were popularly elected and are democratically accountable.41 Commentators have noted that because our society is premised on the notion that value choices should be made by publicly elected officials, the undemocratic character of judicial review cannot be ignored.42

35. Id. amend. IV.
36. Id. amend. I.
37. Although most of the literature on constitutional theory has focused on individual liberties, the problem of constitutional interpretation is no different when the focus shifts to allocation of government power. For example, the crucial question in evaluating presidential power is whether the president can claim inherent powers when the Constitution neither explicitly authorizes nor prohibits presidential actions. See Chemerinsky, Controlling Inherent Presidential Power: Providing a Framework for Judicial Review, 56 S. Cal. L. Rev. 863 (1983).
39. See, e.g., J. Ely, supra note 7, at 5 (defining democracy in purely procedural terms); M. Perry, supra note 8, at 3-4 (replacing the term "democracy" with the phrase "electorally accountable policymaking").
41. See A. Bickel, supra note 27, at 16-17 ("When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.").
42. Even those favoring activist, noninterpretive review agree that majority rule is the key premise of a democratic society. Professor Perry begins his book by writing: We in the United States are philosophically committed to the political principle that governmental policymaking—by which I mean simply decisions as to which values among competing values shall prevail, and as to how those values should be implemented—ought to be subject to control by persons accountable to the electorate.
M. Perry, supra note 8, at 9. Similarly, Dean Ely notes that "[w]e have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government." J. Ely, supra note 7, at 5. Professor Perry and Dean Ely are typical of "most theorists [who] accept, as a general proposition, that in our democracy the devel-

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On the other hand, few are willing to leave to the legislatures all interpretation of the Constitution's open-ended clauses. There is a widely perceived need to protect certain crucial values from democratic interference. For instance, the legislature is not trusted with the sole authority to define the phrases "equal protection of the laws" or "abridging the freedom of speech." In short, "some matters are too important to be left to majority vote." Antimajoritarian judicial review, therefore, is regarded as a desirable and necessary way to prevent tyranny by the majority. As Judge Bork notes:

A Madisonian system . . . has a counter-majoritarian premise, for it assumes there are some areas of life a majority should not control. There are some things a majority should not do to us no matter how democratically it decides to do them. These are areas properly left to individual freedom and coercion in these aspects of life is tyranny. Because the Constitution is ambiguous and because the Framers' intent is regarded as either unknowable or inapplicable to our modern society, the Court inevitably has significant discretion to decide which government actions violate the key, vague constitutional provisions.

A tension thus emerges between the desire to have minority review and the desire to place judicial limits on democratic decisions. This conflict is the persistent problem of constitutional theory. Professor

opment and implementation of public policy is entrusted to institutions and individuals who are accountable to the electorate." Saphire, Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory, 81 Mich. L. Rev. 781, 783 n.6 (1983).

As Justice Jackson noted in West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), "[T]he very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majoritarian officials and to establish them as legal principles to be applied by the courts." Id. at 638.

44. Grano, supra note 5, at 57.


47. See infra text accompanying notes 221-36.

48. See Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151, 158 (1981) ("[G]iven . . . the often explicit grant of discretion to judges to choose among alternative remedies, often no single remedy can plausibly be said to be required by the rule.").

49. Professor Tribe, for example, speaks of the "dichotomy between a democratic political process and an antidemocratic adjudicatory process." L. Tribe, American Constitutional Law 49 (1978); see also J. Ely, supra note 7, at 7 ("Thus the recurring embarrassment of the noninterpretivists: majoritarian democracy is, they know, the core of our entire system, and they hear in the charge that there is in their philosophy a fundamental inconsistency therewith something they are not sure they can deny.").

50. Some commentators, such as Professor Tushnet, suggest that this tension is inherent in all liberal societies. See Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781 (1983); Tushnet, supra note 30, at 1057; Tushnet, supra note 12; see also Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Demo-
Perry poses this question in its classic form:

How can noninterpretive review, given its coercive aspect—the fact that the Court supplants value judgments of electorally accountable officials with value judgments of its own—be reconciled with the principle of electorally accountable policymaking?51

Professor Perry’s formulation of this question is notable in two respects. First, democracy, an obviously vague term, is defined as “electorally accountable policymaking.”52 It requires that “public policies [be] . . . determined either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals.”53 Thus, Perry defines democracy entirely in procedural terms as the method of adopting policies, not in substantive terms as the values that a democratic society desires, such as equality or freedom of expression.54 Moreover, Perry uses the term “democracy” interchangeably with phrases such as “majority rule” or “electorally accountable policymaking,” yet he does not define these concepts with any precision. Second, theories that attempt to reconcile noninterpretive judicial review with democratic theory succeed on their own terms only if they ensure both majority rule and judicial protection of important values that are not explicitly mentioned in the Constitution’s text.

B. The Answers Fail

Professor Perry poses a question that is unanswerable; no theory can make noninterpretive judicial review consistent with majoritarian rule. If democracy requires that values be chosen by electorally accountable officials, judicial review by unelected judges cannot be reconciled with a purely procedural concept of democracy. Either the commitment to democratic principles or the commitment to judicial limits on majoritarian decisions must be sacrificed. The theories of Michael Perry and John Hart Ely—probably the two most prominent and widely discussed current theorists who attempt to reconcile

51. M. PERRY, supra note 5, at 125.
52. Id. at 4.
53. Id. (quoting J. PENNOCK, DEMOCRATIC POLITICAL THEORY 7 (1979)).
54. Id. at 3-4. Some authorities define democracy in substantive terms. See, e.g., Bishin, Judicial Review in Democratic Theory, 50 S. CAL. L. REV. 1099 (1977). But the attempts to reconcile judicial review with democratic theory have focused entirely on the procedural definition of democracy. Unless otherwise indicated, therefore, throughout this Article the term “democracy” will be defined as it is used by Dean Ely and Professor Perry, as “electorally accountable policymaking” or “majority rule.”
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noninterpretive judicial review with democracy—demonstrate this conclusion. Neither scholar’s theory succeeds in preserving both majority rule and activist judicial review.55

I. Professor Perry’s Defense of Noninterpretive Review.—Professor Perry argues that noninterpretive review is essential to elaborate and enforce individual rights that were not constitutionalized by the Framers and to protect these rights from government interference.56 He contends that the “function of noninterpretive review in human rights cases is prophetic”; it should “advance moral evolution” by creating a dialogue that is directed toward finding corrective moral and political values.57 Although Professor Perry advances persuasive reasons in support of noninterpretive review, these reasons demonstrate only why majority rule is not completely trustworthy. These arguments in favor of noninterpretive review do not reconcile judicial review with democratic theory.

So how does Professor Perry attempt to make noninterpretivism consistent with democracy? He says that “the legislative power of Congress . . . to define, and therefore to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts” preserves majoritarian rule.58 Professor Perry contends that congressional power to oversee judicial review by excepting classes of cases from the jurisdiction of the federal courts “accommodates the principle of electorally accountable policymaking” with

55. These, of course, are not the only theories that have been advanced to reconcile judicial review with democratic theory. They do seem to be the most prominent and the most widely discussed, however. Other possible theories are discussed infra text accompanying notes 174-95, 208-69. Many constitutional scholars have developed impressive theories that do not attempt to reconcile judicial review with majoritarian rule. See, e.g., J. Choper, supra note 2, at 79 (“Although the Individual Rights Proposal plainly urges that judicial review should be exercised in behalf of personal constitutional liberties, this book in no way undertakes to say how this superintendence should be carried out.”); Benedict, supra note 3, at 70 (“Choper . . . cheerfully ignores the usual contours of the debate over the judicial role.”); see also L. Tribe, supra note 49, at 111 (“While addressing relevant issues of institutional capacities and role, I do not stop at discussing the Court as the right or wrong forum to review a particular issue and render judgment; the more crucial question for me is whether the judgment itself was right or wrong in the living development of constitutional justice.”).

56. M. Perry, supra note 8, at 93.

57. Id. at 98-99, 101-14.

58. The Constitution provides that the Supreme Court “shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.” U.S. Const. art. III, § 2. The Constitution provides also for congressional discretion to “ordain and establish” lower federal courts. Id. § 1. Apparently, “the decision with respect to the inferior federal courts . . . of defining their jurisdiction . . . was left to the discretion of Congress.” Falmore v. United States, 411 U.S. 389, 401 (1973). But see Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816) (Justice Story’s view that “the whole judicial power of the United States should be, at all times, vested in either original or appellate form, in some courts created under . . . [Congress’] authority”).
noninterpretive judicial review. Congress, a democratic body, can control the courts through the power to restrict federal court jurisdiction and thus can preserve both judicial review and democratic principles. This undoubtedly is the heart of Professor Perry’s theory; he admits that “if in fact Congress did lack such a power, I would not know how to defend noninterpretive review in terms consistent with the principle of electorally accountable policy-making . . . .”

Professor Perry’s theory fails to achieve his goal of ensuring both majority rule and noninterpretive judicial review. He is caught by the same dilemma that he tries to resolve: either restrictions on federal court jurisdiction do not overturn Supreme Court decisions, in which case majority rule is lost, or these limits on jurisdiction do have the effect of reversing the Court’s policy choices, in which case noninterpretivist judicial review is sacrificed.

Consider the first possibility, that Supreme Court decisions would remain valid constitutional law despite subsequent exercise of the congressional power to limit federal court jurisdiction. Restricting court jurisdiction does not, by itself, overrule prior judicial decisions. For example, an act of Congress that prevents federal courts from hearing cases that involve abortion or school prayer would not alter Supreme Court precedents that create a right to abortions or that ban school prayers. The Supreme Court’s decisions would remain the law and both Congress and the states would be obligated to follow them. Instead of reversing prior Court decisions, restrictions on federal court jurisdiction would freeze these decisions, because the Court would have no opportunity to modify its earlier holdings. As a result, the Court’s

59. M. Perry, supra note 8, at 126.
60. Id. at 138. Professor Charles Black advances a similar theory: that activist judicial review is consistent with democratic theory because of congressional power to limit the jurisdiction of federal courts. C. Black, Decision According to Law 17-19, 37-39 (1981).
61. See Kay, Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress, 65 Judicature 185, 187 (1981) (“Removal of court jurisdiction over specific subject matter does not repair any damage. The simple fact is that withdrawing the Supreme Court’s jurisdiction over school prayer does not return prayer to the schools. Withdrawing court jurisdiction over abortion does not outlaw abortion.”).
64. See Cooper v. Aaron, 358 U.S. 1, 18 (1958) (Supreme Court decisions state “the supreme law of the land” and state officials are obligated to follow them); Granio, supra note 5, at 42 (“If state officials behave lawfully—if they adhere to their oath to support the Constitution—they will still be bound by the Court’s decisions, which would remain the law of the land.”).
65. See Kay, supra note 61, at 187; Wechsler, The Courts and the Constitution, 65 Colum. L.}
antimajoritarian decisions would remain unchanged and restrictions on jurisdiction would not protect democratic principles.

The second possibility is that Congress and the states might ignore Supreme Court precedents in areas from which jurisdiction subsequently had been withdrawn, in which case majority rule would be preserved at the expense of judicial review. If Congress could overturn precedents by limiting jurisdiction, the Court’s decisions would survive only as long as a majority of Congress agreed with them. Judicial review as a check on majoritarian tyranny obviously is illusory if the majority can overrule Supreme Court decisions any time that it wishes.

Most commentators, including Professor Perry, recognize that the probable consequence of limiting federal court review would be widespread disregard of earlier decisions, especially because the purpose of jurisdictional restrictions is to change the law substantively. To allow such legislation effectively would overtake specific Supreme Court decisions. It would, in fact, subvert the entire constitutional structure. Congress would have the power to enact unconstitutional laws, for example, that prohibit abortion or that permit voluntary school prayer, and could exempt these laws from federal court review.

REV. 1001, 1006-07 (1965) ("[T]he jurisdictional withdrawal thus might work to freeze the very doctrines that had prompted its enactment.").

66. See Kay, supra note 61, at 188 ("The end result of [the] . . . proposals is that constitutional protections become illusory. . . . The protections of the Constitution will only be what 51 per cent of the House and 51 per cent of the Senate say they are.").

67. M. Perry, supra note 8, at 130-31. Although Professor Perry argues that "there is a difference between reversing the Court on a particular issue and merely silencing the Court," id. at 136, the effect of each is the same. Majority rule is achieved only if laws are enacted that violate the Supreme Court's interpretation of the Constitution. In fact, Congress enacts restrictions on jurisdiction with the goal of changing the substantive law. See Alexander, Pausing Without the Numbers: Noninterpretive Judicial Review, 8 U. DAYTON L. REV. 447, 456-57 (1983) ("There is very little difference between legislative overrules of judicial decisions and legislative withdrawals of jurisdiction.").

68. As Professor Sager observes:

If Congress enacts a selective jurisdictional limitation for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in conduct that the Supreme Court has explicitly held unconstitutional. . . . If, for example, Congress were to enact legislation insulating "voluntary" school prayers from federal judicial scrutiny, there would inevitably be an epidemic of school prayer programs.


69. See Tribe, Jurisdictional Gerrymandering: Zoning Disfavored Rights out of Federal Court, 16 HARV. C.R.-C.L. L. REV. 129, 129-30 (1982) (goal of jurisdictional restrictions is the "de facto reversal, by means far less burdensome than those required of a constitutional amendment, of several highly controversial Supreme Court rulings dealing with such matters as abortion, school prayer, and busing").

70. See Ratner, Congressional Power over the Appellate Jurisdiction of the Supreme Court, 109 U. PA. L. REV. 157, 158 (1960) (noting that with a jurisdiction-limiting statute, Congress "can all but destroy the coordinate judicial branch and upset the delicately posed constitutional system of checks and balances. It can distort the nature of the federal union by permitting each state to decide for itself the scope of its authority under the Constitution.").
In effect, this power would overrule *Marbury v. Madison*71 because the judiciary no longer would be able to rule on the constitutionality of federal statutes if Congress wanted to prevent such review. Moreover, anytime the Constitution is silent (in which case an interpretivist approach would find a statute constitutional), Congress could enact any law and prevent all federal court review.72

Similarly, the core constitutional concept of federal supremacy would be lost, because state courts with Congress' permission could disregard Supreme Court decisions. If Congress were to restrict the Supreme Court's jurisdiction, states could ignore Supreme Court precedents with impunity and make state law supreme over federal. The Supreme Court no longer could ensure state compliance with the Constitution73 in those areas in which Congress had restricted federal court jurisdiction. The notion of a national Constitution with uniform meaning throughout the country would be lost.74 In short, if Congress were to restrict federal court jurisdiction to ensure majority rule, it would endanger "the survival . . . of review of legislative and executive action by an independent judiciary entrusted to enforce the Constitution."75

Professor Perry might respond that these criticisms are overstated, because he would not allow Congress to proscribe judicial interpretivist review.76 His theory allows Congress to restrict jurisdiction only in noninterpretivist areas, in which the Constitution is silent.77 For a number of reasons, this distinction does not affect the criticisms. First, Professor Perry concedes that almost every major Supreme Court decision in the past thirty years has been noninterpretivist78 and therefore

71. 5 U.S. (1 Cranch) 137 (1803).
72. If Supreme Court decisions could be ignored, as Professor Perry suggests, would all noninterpretive decisions simply be impermissible advisory opinions? See, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792).
73. On numerous occasions, the Supreme Court has declared that the central purpose of judicial review is to ensure that the states uniformly follow federal law, including the Constitution. See, e.g., Gordon v. United States, 117 U.S. 597, 699-701 (1886); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 335 (1855); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 356-87 (1821).
74. As the Supreme Court declared, "'Thirteen independent courts . . . of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed.'" Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 415-16 (1821) (quoting The *Federalist* No. 80 (A. Hamilton)).
76. M. Perry, *supra* note 8, at 130-34.
77. Congress need not wait for objectionable Supreme Court decisions before restricting federal court jurisdiction. There is no reason, under Professor Perry's theory, why Congress could not take the initiative and prevent the Court from ever ruling on matters about which the Constitution is silent.
78. M. Perry, *supra* note 8, at 2 ("Virtually all of modern constitutional decisionmaking by
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within Congress' power, in effect, to overrule. Because very few of the Court's constitutional decisions are interpretivist, restricting Congress' power to limit interpretivist decisions hardly protects judicial review. If noninterpretive review is essential to determine the meaning of the Constitution, as Professor Perry claims, it is unsatisfactory to allow it to exist at the sufferance of Congress.

Second, if Congress can assert majority rule to limit noninterpretivist judicial review, why can't Congress assert the same democratic principles to limit interpretivist decisions? All judicial review is antidemocratic. If majority rule is the dominant value, Congress should have the power to limit the Court across the board, especially because article III's "exceptions clause" does not distinguish between interpretive and noninterpretive review.

Third, even if one assumes the validity of Perry's point that Congress can limit only noninterpretive review, the distinction between interpretive and noninterpretive decisions is hardly clear. The Court could circumvent jurisdictional limits by labeling its decisions "interpretivist," and Congress could impose restrictions by terming the areas "noninterpretivist." Constant tension between these branches of the federal government would result. As Professor Sager observes, even if a "majoritarian check on the Court would be desirable, it must still be recognized that the control of jurisdiction by Congress is an utterly wretched device to serve that end."

In response to these criticisms of Perry, some might argue that Congress rarely, if ever, would use its power to restrict federal court jurisdiction. But it is not at all certain that Congress would refrain

the Court . . . is almost wholly a function of constitutional interpretation, but of constitutional policymaking by the Supreme Court.

79. Limiting the Court's jurisdiction has the same effect as overruling the decision. See supra note 67.
80. See A. Bickel, supra note 27, at 16-18; J. Ely, supra note 7, at 11-12.
81. See Alexander, supra note 67, at 453; infra text accompanying notes 169-73.
83. See Kay, supra note 61, at 188 (congressional restriction on federal court jurisdiction would undermine judicial legitimacy); Meserve, Limiting Jurisdiction and Remedies of Federal Courts, 68 A.B.A. J. 159, 161 (1982).
84. Sager, supra note 68, at 39; see also Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 485 n.93 (1984) ("Perry finds himself caught in a contradiction between his conception of moral leadership for judges and the apparently superior authoritative claims of majoritarian institutions."); Wellington, History and Morals in Constitutional Adjudication (Book Review), 97 HARV. L. REV. 326, 328 (1983) ("But what kind of dialogue is it when one participant can silence the other by cutting out his tongue when offended by his words?").
85. See M. Perry, supra note 8, at 134. Arguably, Congress has never completely restricted federal court review because even in Ex parte McCordle, 74 U.S. (7 Wall.) 506 (1869), the primary example of congressional power under the exceptions clause, the plaintiff had other avenues of
from enacting such laws. Additionally, this argument misses the key point: congressional power to restrict federal court jurisdiction cannot reconcile judicial review with democracy defined as majority rule; one or the other inevitably is lost.

2. Dean Ely’s Theory of Noninterpretive Review.—Unlike Professor Perry, Dean Ely does not define what he means by “democracy,” although his book attempts to reconcile noninterpretive judicial review with “democratic theory.” At the beginning of his book, Dean Ely does argue that rule by the majority “is the core of our entire system” and that noninterpretivism is of questionable legitimacy because it runs counter to this premise. Hence, Dean Ely at least implicitly adopts a purely procedural definition of democracy as majority rule.

Again unlike Professor Perry, whose theory attempts to reconcile all noninterpretive review with democratic principles, Dean Ely argues that only one type of noninterpretivism is permissible. Dean Ely takes what he terms a “participation-oriented, representation-reinforcing approach.” He admits that the Courts usurps democratic rule if it imposes substantive values, but he contends that his theory allows the access to the federal courts. See M. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 18 (1980).

86. In 1981, 18 proposals were introduced in Congress to restrict federal court jurisdiction. See Tribe, supra note 69, at 129. “In the fifteen years between 1933 and 1968, over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of specific subjects; none of these became law.” P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler’s The Federal Courts and the Federal System 360 (2d ed. 1973).

Numerous bills now are pending in Congress to restrict federal court jurisdiction. Thus far, the “scholarly consensus” that such restrictions on jurisdiction are unconstitutional has been a “political force [keeping] . . . Congress from enacting [such] . . . legislation.” Tushnet, Legal Realism, Structural Review, and Prophecy, 8 DAYTON L. REV. 809, 813 (1983). Theories such as Professor Perry’s may, if anything, cause a rift in that consensus and increase the likelihood that Congress will enact laws that restrict jurisdiction.

Ample literature already exists detailing why restrictions on jurisdiction as a means of changing the substantive law are unconstitutional. See, e.g., M. Redish, supra note 85; Eisenberg, Congressional Authority to Restric Lower Court Jurisdiction, 83 YALE L.J. 498 (1974); Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 HARV. L. REV. 1362 (1953); Katzen, supra note 70; Sager, supra note 68; Tribe, supra note 69.

The goal of this Article is not to add to this body of literature, but to demonstrate that, regardless of their constitutionality, restrictions on federal court jurisdiction cannot reconcile noninterpretive judicial review with democratic theory. Either court precedents will be followed, in which case majority rule is thwarted, or the decisions will be overturned, in which case noninterpretive judicial review as a check on majority tyranny is lost.

87. If the power to restrict federal jurisdiction is never used, then it is hard to see how it will be an effective tool for asserting majority rule over the judicial process.

88. J. Elz, supra note 7, at 7; see also id. at 4-9 (discussing the symbolism involved in having the people ratify the Constitution and noting the extension of popular control of the government through constitutional amendments).

89. Id. at 87.
Court to avoid making such value choices. Under his model, the sole purpose of constitutional review is to create a fair process, either by providing "procedural fairness in the resolution of individual disputes" or by "ensuring broad participation in the processes and distributions of government." Dean Ely maintains that because his theory allows the Court to avoid making value choices, it "is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American democratic system."  

Dean Ely, like Professor Perry, is trapped by the very dilemma that he tries to resolve: he cannot have both judicial review and a definition of democracy as majority rule. Under Dean Ely's theory, the Court either will impose substantive values, in which case majority rule is lost, or will defer to legislative policy choices, in which case judicial review is meaningless. To demonstrate this dilemma, let us consider how Dean Ely's theory treats specific constitutional provisions.

(a) Provisions that protect substantive rights.—Numerous constitutional provisions protect substantive rights. For example, the Constitution prevents impairment of the obligation of contracts, protects the free exercise of religion and prohibits the government from establishing religion, bans the taking of private property without just compensation, and prohibits cruel and unusual punishment. These provisions do not concern the process of government, as Dean Ely defines it, but

90. See id. at 75.
91. Id. at 87.
92. J. Ely, supra note 7, at 75-77.
93. Ely's theory permits courts to make substantive value judgments, but hides those choices by calling them "process-based." See infra text accompanying notes 100-16.
95. Id. amend. I.
96. Id. amend. V.
97. Id. amend. VIII.
98. As Professor Tribe points out: Religious freedom, antislavery, private property: much of our constitutional history can be written by reference to just these social institutions and substantive values. That the

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rather constitute clearly substantive rights that the Constitution prevents the government from infringing. These constitutional rights present Dean Ely with a dilemma. He can contend that the Court should refuse to enforce these provisions because none of them relates to the process of government, in which case judicial review of key constitutional safeguards is lost, or he can allow the Court to interpret the meaning of these provisions, in which case majority rule is denied as courts overturn legislative policies to protect these rights.

Dean Ely seems to choose the latter alternative, for in a number of places he demonstrates how his process-based theory protects substantive values, such as the right to travel. Yet, this seems to be exactly the kind of antimajoritarian value imposition that Ely opposes. In protecting the right to travel interstate, the Court would strike down legislative choices on the basis of a right not mentioned in the Constitution. The Court’s imposition of values is the same under Ely’s theory as it is under the noninterpretivist model; only the justification differs.

Moreover, under Dean Ely’s expansive definition of “process,” virtually every constitutional issue can be phrased in procedural terms that justify judicial review. For example, even the decision that the state cannot restrict a woman’s right to an abortion (viewed by Ely as the height of judicial value imposition) can be justified under a process-oriented model. Applying Ely’s definition of equal protection, the Court could find that laws which prohibit abortion deny to a minority, the poor, a service available to the majority who can afford

Constitution has long addressed such matters, and often with beneficial effect, ought to surprise no one. What is puzzling is that anyone can say, in the face of this reality, that the Constitution is or should be predominately concerned with process and not substance.

Tribe, supra note 92, at 1067 (emphasis in original).


100. Dean Ely argues that the right to travel would be upheld under a process model because “one should have an option of escaping an incompatible majority.” J. Ely, supra note 7, at 179.


104. According to Dean Ely, the Constitution is based on the “quite sensible assumption that an effective majority will not inordinately threaten its own rights, and ... [seeks] to assure that such a majority not systematically treat others less well than it treats itself.” J. Ely, supra note 7, at 100-01.
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to travel to states or countries where abortion is legal. Pressure from vocal special interest groups blocks the democratic process and necessitates Court action to ensure protection of the minority. Although this argument may not be the strongest for legalized abortions, it illustrates how the Court can cast any decision in procedural terms.

(b) Process-based provisions.—Ely does not avoid the need for the Court to make substantive value judgments even when he analyzes process-based constitutional provisions. If the Court defines what is a fair process, majority policies are overruled; if it must defer to legislative determinations of fairness, judicial review is nonexistent. Ely chooses the first alternative; he would permit the judiciary to determine what is a just process of government. But it is impossible for the Court to decide what is “fair” or “just” representation without making substantive value judgments. For example, at what point is malapportionment of state legislatures so egregious that it is unconstitutional? There is no way to decide this issue without a substantive theory of democracy; thus, the Court inevitably must substitute its judgment for that of the popularly elected legislature.

Furthermore, in deciding whether an adjudicatory process is fair, the Court must make the same choices that it would under the

105. See Brest, The Substance of Process, 42 OHIO ST. L.J. 131, 131 (1981) (noting that “the parties’ claims in fundamental value cases are often translatable into representation reinforcing claims”). Other commentators also have argued that Dean Ely’s theory would justify creating a right to legalized abortions. See Cox, Book Review, 94 HARV. L. REV. 700, 710-11 (1981); Dworkin, supra note 1, at 515-16. In fact, Professor Frank Michelman argues that Dean Ely’s theory can justify judicial action guaranteeing all citizens a right to basic entitlements, an action likely to be regarded as the height of judicial activism. See Michelman, Welfare Rights in a Constitutional Democracy, 1979 WASH. U.L.Q. 659, 674-80. But see Winter, Poverty, Economic Equality, and the Equal Protection Clause, 1972 SUP. CT. REV. 41 (discussing constraints on the Court’s power in the area of income redistribution).


107. See Tribe, supra note 92, at 1069-70.

111. See, e.g., Abate v. Mundt, 403 U.S. 182 (1971) (sustaining deviations from mathematical equality by a range of up to 11.9%); Reynolds v. Sims, 377 U.S. 533, 579-80 (1964) (describing instances in which deviations from one-person one-vote are permissible); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (holding that approval in a popular referendum cannot sustain impermissible malapportionment).

noninterpretivist approach. For instance, deciding whether the fifth amendment mandates free counsel for criminal defendants or whether suspects should be given Miranda warnings requires the Court to define and balance individual rights against society's interest in apprehending criminals. Ely's definition of democracy demands that politically accountable legislatures perform such balancing. Nonetheless, Ely states that under his process-oriented model, the Court would decide these issues because they relate to the fairness of the criminal process. What criteria would the Court use in choosing which values have priority? As Ely offers no alternative to the Justices using their own values, his approach ultimately is no different from the noninterpretivist methods that he criticizes.

Ely contends that his theory is consistent with democracy even though judges usurp the majority's policy choices, because democracy requires proper representation and fair processes. This argument, however, reveals a shift in his definition of democracy. If democracy is defined in procedural terms as a requirement that value choices be made by electorally accountable officials, then judicial reversals of legislative decisions are inconsistent with majority rule, regardless of the content of the Court's decisions. To justify his theory, Ely must adopt a definition of democracy that includes substantive values such as fair representation and just processes. While this latter definition may be preferable, it is different from the core concept of democracy, majority rule, that Ely initially set out to reconcile with judicial review. Although the content of the Supreme Court's decisions may further the representation of all in society, "the process of judicial review is not democratic because the Court is not a politically responsible institution." Thus, even judicial review that is "representation-reinforcing" inevitably involves judges using their values to displace legislative decisions.

113. See Tribe, supra note 92, at 1069.
117. Id. at 75, 103.
118. See infra text accompanying notes 133-68.
119. Defining democracy as requiring fair representation and just adjudicatory processes is not value neutral. As Professor Tushnet comments, "The fundamental difficulty with Ely's theory is that its basic premise, that obstacles to political participation should be removed, is hardly value free." Tushnet, supra note 30, at 1045.
120. J. Choper, supra note 2, at 9-10.
121. See, e.g., Dworkin, supra note 1, at 504 (claiming that definition of "the best concept of democracy" requires discussion of "substantive political judgments"); Estreicher, supra note 112,
(c) The equal protection clause.—Finally, consider Ely’s theory in relation to the equal protection clause of the fourteenth amendment. An unequivocal commitment to majority rule requires acceptance of the reality that majorities frequently persecute minorities. Judicial protection of minorities is inherently antidemocratic because the Court is thwarting the will of popularly elected legislators. While protecting minorities is indeed a crucial function of the Court, its desirability does not make it democratic. Unless democracy is redefined to include the substantive value of equal protection, judicial protection of minorities is inherently inconsistent with majority rule.

Furthermore, the Court must make substantive value choices in determining what is equal. Deciding whether people are alike and deserve to be treated alike requires some substantive basis for comparison. For example, Ely argues that laws discriminating against blacks are invalid because they are based on “prejudice,” but those prohibiting homosexuality might be justified because they are based on “moral judgments.” However, all who are discriminated against, including homosexuals, claim that the basis for their persecution is prejudice, and

at 551 (Dean Ely’s theory fails on its own terms because it does not avoid judicially imposed substantive value judgments.).

122. J. ELY, supra note 7, at 125-79.
123. See Richards, The Aims of Constitutional Theory, 8 U. DAYTON L. REV. 723, 739 (1983) (Dean Ely is wrong because democratic theory does not provide any special protection of minorities); see also Bishin, supra note 54, at 1114-17 (democratic theory permits exclusion of minorities).
124. See Estreicher, supra note 112, at 575 (“No . . . claim can be made that judicial intervention in aid of minority groups is necessarily consistent with, or particularly supportive of, representative democracy.”)
125. See J. ELY, supra note 7, at 103, 135-79.
126. For example, Dean Ely’s theory of “virtual representation,” id. at 82-87, 100-01, adds a new element to the definition of democracy because it requires effective representation of all groups in society. While this addition is certainly justified, it nevertheless is a limitation on the principle of majority rule with which Ely begins; it replaces the strictly procedural definition of democracy with a substantive one.
127. See Estreicher, supra note 112, at 577 (noting that judicial intervention on behalf of minorities may not be “consistent with the premises of representative democracy in the absence of a substantive theory proscribing the use of racial classifications or posting a duty of representation that precludes consideration of race to the detriment of that group”).
128. See Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537 (1982). Although a number of commentators have challenged Professor Westen’s conclusion that the concept of equality should be banished from moral or legal discourse, id. at 542, none of them has challenged his premise that all discussions of equality require the use of other substantive values. See Burton, Comment on “Empty Ideals”: Logical Positivist Analyses of Equality and Rules, 91 YALE L.J. 1136 (1982); Chemerinsky, In Defense of Equality: A Reply to Professor Westen, 81 MICH. L. REV. 575 (1983); D’Amato, Is Equality a Totally Empty Idea?, 81 MICH. L. REV. 600 (1983).
129. J. ELY, supra note 7, at 256 n.92; see also M. PERRY, supra note 8, at 153 (determining whether distinctions are the result of prejudice or legitimate differences requires substantive judgments); Tribe, supra note 92, at 1076 (condemnation of laws that affect minorities must “depend on a substantive theory of which groups are exercising fundamental rights and which are not”).

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all who discriminate claim a moral basis for their actions. In sum, any judicial review under the equal protection clause is inconsistent with the principle of majority rule.

The point is not that the Justices should ignore participational values. Dean Ely persuasively argues that these are among the most important values that the Court protects. Rather, my point is that Ely’s theory fails to reconcile noninterpretive review with his definition of democracy because the Court still overturns the decisions of popularly elected officials based on their own substantive value judgments.

Professors Ely and Perry are not alone in their failure to accommodate both democratic principles and noninterpretivism. If democracy is defined as requiring that all value choices be made by elected officials, as Ely and Perry define democracy, no theory can ever justify noninterpretivism. The question is formulated in a way that makes an answer logically impossible: a requirement that all policy decisions be made by majority rule precludes unelected judges from ever making value choices. This should not imply that judicial review is suspect; it means rather that we have been asking the wrong question.

III. Shifting the Ground of the Debate: Identifying the Proper Questions

A. Unmasking Interpretivism: Why Majority Rule Is Not the Issue

Interpretivists argue that the Court usurps democratic rule when it decides cases based on norms not stated or implied in the Constitu-

130. See Baker, Neutrality, Process, and Rationality as Flawed Bases for Interpreting Equal Protection, 58 Texas L. Rev. 1029, 1041 (1980); Tribe, supra note 92, at 1076. All who challenge a law arguably constitute a minority that opposes a decision by the majority. See J. Cooper, supra note 2, at 76. Thus, courts need substantive criteria to determine which minorities deserve judicial protection.

131. See Brest, supra note 106, at 131 (“[M]ost instances of representation-reinforcing review demand value judgments not different in kind or in scope from the fundamental values sort.”).

132. As Professor Maltz remarks:

[T]he exercise of judicial review is fundamentally inconsistent with the theory of democratically accountable government. This fact does not condemn the practice; one can still argue that the abandonment of democratic principles leads to a better governed nation. But unless one is willing to forthrightly take this position, any defense of noninterpretive review is doomed to failure.

Maltz, Murder in the Cathedral—The Supreme Court as Moral Prophet, 8 U. Dayton L. Rev. 623, 631 (1983); see also Brest, supra note 99, at 1063 (arguing that “the controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional scholarship—is essentially incoherent and unresolvable”); Burt, supra note 84, at 485 n.93 (Professor Perry’s “basic error is in seeking to legitimize judicial review by identifying principles for hierarchically ranking the relative authority of judicial and majoritarian institutions. He has distinguished company in the commission of this error; it has been the dominant theme of constitutional law scholarship at least since James Bradley Thayer.”)
tion. 133 For example, Judge Robert Bork states that "a Court that makes rather than implements value choices cannot be squared with the propositions of a democratic society." 134 But why isn't all judicial review, including interpretivism, improper, as it all involves unelected judges overturning policies enacted by electorally accountable officials? Why is the necessary and logical implication of the interpretivists' argument never drawn out, that Marbury v. Madison 135 should be overruled and that the majority, through popularly elected legislatures, should have the final say on the meaning of the Constitution?

Interpretivists try to answer this question by distinguishing between interpretivism and noninterpretivism. They claim that an interpretivist methodology merely applies the Constitution's values, whereas a noninterpretivist one requires that unelected judges impose their own values. 136 Assuming, however, that interpretivism avoids judicial value judgments—a highly doubtful assumption 137—judicial review still is not democratic because any ruling overturning decisions by popularly elected officials is by definition undemocratic. Although the Court may follow the Constitution, it still thwarts majority will and therefore violates democratic principles if it strikes down legislative or executive policies. 138

Interpretivists may answer that the Framers of the Constitution intended that their choices be followed and, thus, that the Court is obligated to do so. 139 This claim is premised on highly questionable history and logic. As Alexander Bickel observed, the "authority to determine the meaning and application of a written Constitution is nowhere defined or even mentioned in the document itself." 140 There is

133. See, e.g., R. Berger, supra note 4; Bork, supra note 4; Rehnquist, supra note 4.
134. Bork, supra note 4, at 6.
135. 5 U.S. (1 Cranch) 137 (1803).
136. See, e.g., Sager, Rights Skepticism and Process Based Responses, 56 N.Y.U. L. REV. 417, 422 (1981) ("When the Court . . . begins to generate notions of individual rights from extraconstitutional sources, violence is done to majoritarianism as our guiding theory of governance.").
137. Interpretivism is consistent with majority rule only if judges do not have discretion and can adhere to the majority's views in deciding cases. Because formalism is impossible, however, discretion is inevitable in the application of laws. See H.L.A. Hart, The Concept of Law 125 (1961); H. Kelman, The Pure Theory of Law 349 (1970) ("Even the most detailed command must leave to the individual executing the command some discretion. Hence every law-applying act is only partly determined by law and partly undetermined."). Additionally, history is rarely unambiguous and judges inevitably exercise discretion in deciding what the Framers intended. See infra text accompanying notes 209-36.
138. See A. Bickel, supra note 27, at 16-18 (judicial review inherently presents countermajoritarian difficulty).
139. See Saphire, supra note 11, at 765 (presenting the interpretivist argument, attributed to Raoul Berger, that the Framers' intent should be followed because the Framers intended that it be followed).
140. A. Bickel, supra note 27, at 1; see also Perry, Interpretivism, Freedom of Expression, and
great dispute about whether the Framers intended judicial review, and “no historical materials suggest that any group of framers ever constitutionalized any theory of the proper scope of judicial review, whether narrow, like interpretivism, or broad.” Furthermore, it is circular to say that because the Framers intended that we follow their intent, we are obligated to follow it. There must be some substantive theory explaining why it is appropriate to interpret the Constitution according to the Framers’ intent.

More importantly, even if the Framers intended that the Court adhere to the Framers’ expectations and even if this obligates it to do so, judicial review is still undemocratic. Judges applying the Framers’ intent are striking down statutes enacted by popularly elected legislatures based on the desires of men who lived two centuries ago. If interpretivists criticize activist judicial review for being rule by nine “platonic guardians,” is not following the Framers’ intent rule by a small group of long dead guardians? The point is a simple one: judicial review is antimajoritarian even if it strictly adheres to intended constitutional norms.

Interpretivists often answer that interpretive judicial review is democratic because the people consented to the adoption of the Constitution. As society can be governed by statutes that were enacted

*Equal Protection, 42 OHIO St. L.J. 261, 266 (1981) (stating that “the bare text is equivocal with respect even to most interpretive review”).

141. See, e.g., J. Choper, supra note 2, at 423 nn.7-8; 2 W. Crosskey, Politics and the Constitution 1008-46 (1953) (arguing that the Framers did not intend judicial review); Monaghan, The Constitution Goes to Harvard, 13 HARV. C.R.-C.L. L. REV. 117, 125 (1978) (noting that it is “increasingly doubtful that any conclusive case can be made one way or the other. It is an underestatement to say that the framers lacked clarity in their thinking”).

142. M. Perry, supra note 8, at 74. Dean Choper observes that [w]hatever indications may be gleaned from intention or text on the issue of whether the Court should possess the power of judicial review, these sources afford virtually no assistance whatever on the related question of the form and scope of judicial review . . . ; of whether . . . the Court should assume a stance of activism or restraint.

J. Choper, supra note 2, at 63.

143. See Kay, Preconstitutional Rules, 42 OHIO St. L.J. 187, 193 n.22 (1981) (“It is anomalous to argue . . . that recourse to the intention of the Framers of the Constitution is required . . . [as] demonstrated from a review of the Framers’ intention.”); Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 383 n.177 (1981) (contending that it is “bootstrapping” to say that courts must follow the Framers’ intent because the Framers intended it to be followed).

144. Judge Learned Hand wrote this famous phrase: “For myself it would be most irksome to be ruled by a bevy of Platonic guardians, even if I knew how to choose them, which I assuredly do not.” L. Hand, THE BILL OF RIGHTS 73 (1958).

145. See Alexander, supra note 67, at 454 n.29 (“Why should the framers, but not the Supreme Court, have the authority to bind us to value judgments not endorsed by contemporary political bodies?”). Moreover, it should not be forgotten that the Framers, who were all white, landowning males, were hardly representative of their society, let alone ours. See, e.g., Miller, Toward a Definition of the Constitution, 8 U. DAYTON L. REV. 633, 679 (1983).

146. See, e.g., Bork, supra note 4, at 3 (“Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach
long ago by democratic legislatures, so can society be ruled by the Constitution that was ratified by the people. As Professor Brest points out, however, “Even if the adopters freely consented to the Constitution . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind subsequent generations. We did adopt the Constitution, and those who did are dead and gone.” Although a contemporary majority can overrule an old statute, a majority cannot change the Constitution. In short, to say that interpretive review is democratic because the people adopted the Constitution is erroneous, because not a person alive today, and not even most of our ancestors, voted in its favor.

Interpretivists try to circumvent this argument by contending that the failure of subsequent generations to change the Constitution indicates an implicit consent to its authority. In other words, by tacitly consenting to the Constitution, we agree to be ruled by it; thus, its interpretive application is democratic. This argument assumes that a failure to amend the Constitution indicates contemporary majority approval of the document. By making this assumption, however, interpretivists concede the legitimacy of all noninterpretive review. If the failure to amend the Constitution constitutes democratic consent, then the failure to overrule noninterpretive Supreme Court decisions

of majorities by the Constitution.”); Lupu, supra note 82, at 590 (“Interpretivists, echoing Hamilton in the Federalist Papers, argue that consent requirements are satisfied in the exercise of judicial review on grounds of enforcement of values which ‘the people’ have enshrined in the constitutional text.”); Sager, supra note 136, at 422 ("The process of ratification makes the Constitution and its amendments harmonious with democratic theory, just as the legislative process makes ordinary legislation legitimate.").

147. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 225 (1980).

148. Id.; see also J. ELY, supra note 7, at 11 (dismissing the "idea that in applying the Constitution—especially the written Constitution of the interpretivist—judges are simply applying the people's will").

149. Article V of the Constitution permits constitutional amendments only if they are ratified by two-thirds of both Houses of Congress (or by a constitutional convention convened by the states) and by three-fourths of the states. U.S. Const. art. V.

150. See Bishin, supra note 123, at 1111. Furthermore, even if the people consented to the Constitution itself, that consent does not justify constitutional decisions based on the Framers' intent. As Justice Story noted, “Nothing but the text itself was adopted by the people.” 1 J. Story, Commentaries on the Constitution of the United States 300 (4th ed. 1873).


152. See Brest, supra note 147, at 225.

153. This argument is problematic because, even if a majority opposed the Constitution, that majority could not change it unless a supermajority favored the reform. Thus, the absence of a constitutional amendment does not mean that a majority supports the document as it stands.
by constitutional amendment implies consent to those decisions.\textsuperscript{154} The interpretivist argument that consent based on silence accords with democratic principles forfeits the entire debate to the noninterpretivists, because this analysis indicates that there has been implicit consent to all Supreme Court decisions except the few that have been overruled by constitutional amendment.\textsuperscript{155}

So why do interpretivists permit any judicial review? They often give the simple answer that without judicial review the Constitution would have no meaning. For the Constitution to have any value, society must comply with and uphold it.\textsuperscript{156} Of course, the question then becomes: why not trust the legislature to preserve the Constitution? Why allow antimajoritarian review? If majority rule is the highest value in a democracy, why should a legislature feel bound to the Constitution at all? Shouldn’t it be able to follow the wishes of the majority? The interpretivist must argue at this point that the Constitution is so important that the majority should not be able to disregard it. The purpose of the American Constitution is to protect certain values from majority passions,\textsuperscript{157} and judicial review exists to carry out that constitutional purpose.

This argument does not reconcile interpretivist judicial review with majority rule. To the contrary, it rests on the premise that the Constitution is more important than majority rule. This argument for judicial review is a functional one, based on the need to protect certain values from democratic decisions. Simply put, interpretivist review is supported, not because it is consistent with democratic principles, which it obviously is not,\textsuperscript{158} but because constitutional government is deemed more important than majority rule.\textsuperscript{159}

But if interpretivists are willing to sacrifice majority rule, are they

\textsuperscript{154} See Brest, supra note 147, at 236 ("If inaction can be taken as tacit consent to anything—a problematic assumption in any case—it is to the Court’s decisions, including its nonoriginalist decisions.").

\textsuperscript{155} Constitutional amendments have overturned Supreme Court decisions on only four occasions. The eleventh amendment overturned the holding of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); the fourteenth amendment overturned, in part, the holding of Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); the sixteenth amendment overturned the holding in Pollock v. Farmers’ Loan & Trust Co., 157 U.S. 429 (1895); and the twenty-sixth amendment overturned Oregon v. Mitchell, 460 U.S. 112 (1970). See L. Tribe, supra note 49, at 51 n.8.

\textsuperscript{156} For example, Professor Grano, a contemporary interpretivist, argues that without judicial review there would be "constitutional anarchy." Grano, supra note 5, at 5.

\textsuperscript{157} See, e.g., L. Tribe, supra note 49, at 9-11 (arguing that the purpose of a constitution is to thwart short-term impulses to achieve greater long-term benefits).

\textsuperscript{158} See J. Elty, supra note 7, at 11 ("Incompatibility with democratic theory is a problem that seems to confront interpretivist and noninterpretivist alike.").

\textsuperscript{159} Professor Perry, for example, notes that the entire justification for interpretive review is functional. M. Perry, supra note 8, at 13-16.
not disingenuous in criticizing noninterpretivists for being antimajoritarian? As all judicial review is antidemocratic, to argue against it based on majoritarian principles is pointless. If a functional justification can support interpretive review, the only question is whether there is an equally compelling functional justification for noninterpretive review. In fact, the functional justification for noninterpretive review is identical to that advanced for interpretivism—the need to protect certain crucial values from majoritarian interference.\textsuperscript{160}

In other words, once we agree that constitutional values are more important than majority rule, the question becomes: which values should be protected from the majority? The concept of majority rule obviously provides no answer to this question and supplies no reason to prefer interpretive values over noninterpretive ones. Because the Constitution is silent about the practice of judicial review, a procedural question inevitably arises: how should the Court decide which values to protect? This is really a question of how much discretion the Court should have in determining which are the constitutionally protected values. As constitutional scholar Arthur S. Miller observed: "The basic question from the standpoint of American constitutionalism is to determine how much discretionary power the people are willing to consign to the judges . . . ."\textsuperscript{161}

This question is much different from the one usually asked. It is pointless to ask whether judicial review can be reconciled with democratic theory because, by definition, it cannot; constitutional review is intended to be antimajoritarian. To ask how much discretion the Court should have in interpreting the Constitution concedes that judicial review is always antimajoritarian. The debate is over something that can be argued about: how much latitude the Court should have in determining the meaning of the Constitution.

Upon reflection, it should not be surprising or disconcerting that all judicial review, interpretive and noninterpretive, is equally antimajoritarian. The American Constitution is intended to be antidemocratic; therefore, courts applying its provisions also will be antidemocratic.\textsuperscript{162} The Constitution is explicitly antimajoritarian in

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\item \textsuperscript{160} This is, of course, an oversimplification of the functional justification for noninterpretive review. Much more detailed justifications are needed. The main point here is that both interpretivism and noninterpretivism are based on the assumption that the Court should protect key values from majority rule. The difference between the two theories is that they direct judges to different sources to find those values.
\item \textsuperscript{161} Miller, \textit{supra} note 40, at 349.
\item \textsuperscript{162} Professor Sager has observed:
The element of our political life that is most embarrassing to such a view [of democratic rule] is the Constitution itself. The Constitution stipulates the existence of rights that
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many places.\(^{163}\) The electoral college, the composition of the Senate, and the elaborate procedures for constitutional amendments are a few examples of the many antismallitarian constitutional provisions\(^{164}\) that are based in part on distrust of majorities and that cannot be reconciled with a purely procedural definition of democracy.\(^{165}\)

This is not to say that majority rule is unimportant. Although it is obviously an important value in our society, it is not an absolute value. There is no need to choose between always having majority rule and never having it.\(^{166}\) The Constitution was based on a general assumption of majority rule, limited by a number of antismallitarian checks. Judicial review is one such deviation from majoritarian principles. Thus, while majority rule is valued, it is not synonymous with "democracy." The concept of democracy used by scholars such as Berger, Bork, Ely, and Perry is misguided because, in many respects, American democracy is intentionally antismallitarian.

In sum, the key error in much of constitutional scholarship is that it begins with a definition of democracy that does not correspond to the American Constitution. The Constitution is based neither on a concept directly and deliberately defeat majority will. Further, the cumbersome procedures and supermajorities required to amend the Constitution give it an internal capacity to resist change even after some of its aspects lose the support of the majority of those subject to its dictates.

Sager, supra note 136, at 443; see also Tushnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies, 57 Tex. L. Rev. 1307, 1308 (1979) (noting that the function of constitutional law "is precisely to displace decisions made by a majority . . . in favor of the interests of the minority").

163. See, e.g., J. Choper, supra note 2, at 29-46. In fact, as Professor Brilmayer points out, even a legislature that applies the Constitution acts in a countermajoritarian fashion:

Where there is a written constitution, some measure of countermajoritarianism is positively desirable. And in seeking to limit judicial contradiction of majority will, proponents of judicial restraint are relying upon an irrelevant fact, namely, the fact that federal judges do not run for office. This fact is irrelevant because it legislatures seriously fulfill their responsibilities to consider whether their activities are constitutional, they also risk behaving in a countermajoritarian fashion.


165. See Bennett, supra note 50, at 1089 ("Initially, we both cherished and mistrusted legislative rule, and we continue to do so.");

166. See R. Dahl, A Preface to Democratic Theory 34-62 (1956) (democracy does not require majority rule for all purposes); Commentary, 56 N.Y.U. L. Rev. 525, 536 (1981) ("There is nothing in the Constitution that elevates principles of majoritarianism above other rights-bearing principles with which that document is laced.") (comments of Professor Sager). Professor Perry might argue that this Article "reject[s] the principle of electorally accountable policymaking." M. Perry, supra note 9, at 9. To the contrary, the point is that we need not wholly accept or reject electorally accountable policymaking. Our society is generally, but not totally, governed by democratically elected officials, and democratic rule in America includes both procedural and substantive elements.
of democratic rule that is purely majoritarian nor on an assumption that all policies must be chosen by electorally accountable officials.\textsuperscript{167} A correct definition of democracy must include both procedural and substantive values. Noninterpretivists have erred in allowing critics of activist judicial review to set the ground of the debate in a way that is intellectually dishonest and futile. It is time to shift the debate to issues that can be debated, such as what the Constitution means and how much discretion the Court should have in constitutional interpretation.\textsuperscript{168}

\textbf{B. The Debate over Judicial Discretion}

Most of the discussion about judicial review concerns the dispute between “interpretivists” and “noninterpretivists.”\textsuperscript{169} These labels confuse much more than they clarify. All constitutional theories are to some extent interpretivist, because all at least begin by interpreting the language of the written Constitution.\textsuperscript{170} At the same time, all theories are to some extent noninterpretivist, because the Constitution’s text and history are often ambiguous and require courts to make choices in interpretation.\textsuperscript{171} Many theories do not fit either label. For example, is someone who believes that constitutional decisions should be based on how the Framers would deal with modern problems an interpretivist or a noninterpretivist?\textsuperscript{172} The terms interpretivism and noninterpretivism obscure the fact that within each approach there is a range of separate, distinct methodologies, each permitting different degrees of judicial discretion.\textsuperscript{173}

\textsuperscript{167} Perhaps the best term for our form of government is Professor Murphy’s phrase “constitutional democracy.” \textit{See} Murphy, \textit{An Ordering of Constitutional Values}, 53 S. CAL. L. REV. 703, 729 (1980).

\textsuperscript{168} One could respond that if all judicial review is inherently antidemocratic, none should exist. This response, of course, would overrule Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), and almost 200 years of precedent. Although the argument that there should be no judicial review is intellectually defensible, it is highly unlikely that anyone would take such a position. Almost all analysis of the Court’s role “accept[s], as it must, the institution of judicial review.” A. BICKEL, supra note 27, at 3. Thus, this Article does not address the position that all judicial review should be eliminated, even though that is one possible response to its arguments.

\textsuperscript{169} \textit{See} Saphire, supra note 139, at 745.

\textsuperscript{170} \textit{See} Dworkin, supra note 1, at 472; Estreicher, supra note 112, at 549 n.7 (noting that even those who believe that the Constitution should protect “natural rights” claim to interpret the Constitution). In fact, the distinction between interpretivism and noninterpretivism is blurred further because some authorities use interpretivist methodologies to justify noninterpretivism. \textit{See}, e.g., Saphire, supra note 42, at 785 (stating that “noninterpretive methodologies are defended as either mandated or authorized, either explicitly or implicitly, by the Constitution’s text or structure and the framers’ intent”).

\textsuperscript{171} \textit{See} Dworkin, supra note 1, at 472. \textit{See generally} Moore, supra note 48 (concluding that a judge must construe what he cannot discover).

\textsuperscript{172} \textit{See} J. Elly, supra note 7, at 12.

\textsuperscript{173} \textit{See} Saphire, supra note 42, at 784 (“Neither interpretivism nor noninterpretivism has
I identify six major theories of judicial review, each allowing the Court different latitude in interpreting the Constitution.\textsuperscript{174} \textit{Literalism} is the view that all constitutional interpretation must be based solely on the constitutional text.\textsuperscript{175} Under this approach, no extraconstitutional materials are relevant. Instead, the Court's task is "to lay the Article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."\textsuperscript{176} Justice Hugo Black, for example, argued that judicial review is illegitimate if it is based on anything other than the text of the Constitution.\textsuperscript{177}

\textit{Originalism} is a theory that "accords binding authority to the text of the Constitution or the intention of its adopters."\textsuperscript{178} Unlike literalism, originalism permits the Court to look beyond the language of the Constitution, but limits it to ascertaining the meaning that the Framers intended.\textsuperscript{179} Under this approach, "[t]he whole aim of construction, as applied to a provision of the Constitution . . . is . . . to ascertain and give effect to the intent of its framers and the people who adopted it."\textsuperscript{180} In other words, the meaning of the Constitution is static; the only relevant sources of constitutional interpretation are the language of a provision and its preratification history.\textsuperscript{181}

\textit{Conceptualism} requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles.\textsuperscript{182} Unlike originalism, conceptualism

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\item\footnote{To avoid confusion and proliferation of terminology, this Article will use labels that are already used for these theories, unless there is some substantive reason for a change in terminology.}
\item Professor Bennett uses the term "literalism" to describe this theory. Bennett, \textit{supra} note 50, at 1089.
\item United States v. Butler, 297 U.S. 1, 62 (1936).
\item Brest, \textit{supra} note 147, at 204. Raoul Berger is a classic example of an originalist. See R. Berger, \textit{supra} note 4, at 408; see also Rehnquist, \textit{supra} note 4, at 694-95 (acknowledging that the language of the Constitution may apply to cases not foreseen by the Framers, but criticizing the view that the Court should "substitute[e] some other set of values for those which may be derived from the language and intent of the framers").
\item Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).
\item Professor Brest terms this theory "moderate originalism." Brest, \textit{supra} note 147, at 205 (stating that "moderate originalism . . . [is] more concerned with the adopters' general purpose
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does not require that the Court follow the Framers’ specific intentions. Instead, the Justices are asked to identify the underlying “concept” of a provision and to use it in formulating modern “conceptions” to guide decisionmaking. Each constitutional provision has a core meaning that is static, which the courts apply to modern circumstances.

Cultural values theories require the Court to use basic social values not expressed in the constitutional text as the basis for constitutional interpretation. For example, Dean Wellington states that the “Court’s task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law.” Some believe that cultural values are to be found in America’s traditions; others argue that they should be found in a moral consensus. Regardless of the source of the values, the common characteristic of these approaches is that the Court interprets constitutional provisions on the basis of “deeply embedded cultural values.”

than with their intentions in a very precise sense”). It is a distinct theory from originalism, however, because originalism limits constitutional interpretation to what the Framers intended, whereas conceptualism allows consideration of modern circumstances in interpretation. It is appropriate, therefore, to give this theory a label of its own, instead of viewing it as one type of originalism.

Undoubtedly, the Framers’ intent may exist at many different levels of abstraction. The distinction between originalism and conceptualism is not always clear; ultimately, the difference is that originalism is based on the belief that the meaning of the Constitution is static, but conceptualism endorses the view that the precise meaning of the Constitution shifts over time.

Professor Dworkin makes this distinction between “concepts” and “conceptions.” See R. Dworkin, Taking Rights Seriously 134-36 (1978) (arguing that vague constitutional clauses represent “concepts” that each generation infuses with meaning through translation into particular “conceptions”); see also Munzer & Nickel, supra note 179, at 1037:

The object of the distinction between concepts and conceptions is to justify the claim that the core meaning of the Constitution remains unchanged even when judges diverge from the specific content that the framers would have found there. To appeal to a conception is to appeal to a specific understanding or account of what the words one is using mean. To appeal to a concept is to invite rational discussion and argument about what words used to convey some general idea mean.

184. The conceptualist approach is reflected in the question “[w]hat results would the drafters have intended had they been confronted with the problems and context of today’s world?” L. Lusky, By What Right 21 (1975); see also Linde, Judges, Critics, and the Realist Tradition, 82 Yale L.J. 227, 254 (1972) (“[T]he judicial responsibility begins and ends with determining the present scope and meaning of a decision that the nation, at an earlier time, articulated and enacted into constitutional text . . . .”).

185. This theory of interpretation draws upon values found in natural law, tradition, and social consensus. See J. Ely, supra note 7, at 48-54, 60-69.


188. See J. Ely, supra note 7, at 63-69.

189. G. White, Patterns in American Legal Thought 160 (1978). Conceptualism can be based upon cultural values; there is no reason why the concepts must be based upon the Framers’
Process-based modernism permits the Court to decide cases on the basis of contemporary values, but limits such discretion to improving the process of representation or adjudication. Under this theory, the Court is obligated to use the originalism paradigm except for matters that relate to fair processes of government. In this area, the Court may act on norms not mentioned in the Constitution or intended by the Framers. As discussed earlier, Dean Ely advances this theory.

Finally, open-ended modernism permits the Court to interpret all constitutional provisions on the basis of contemporary values that the Justices regard as worthy of constitutional protection. The only limit under this approach is that the Court may not act contrary to the text of the Constitution. The Court performs a “creative function of discerning afresh and articulating and developing impersonal and durable principles.” Thus, it is not limited to those values mentioned in the text, intended by the Framers, cherished in traditions, or appreciated by consensus. The Court is accorded great discretion in determining which values are so important that they should be constitutionalized and therefore immunized from majority pressures.

The debate about the proper scope of judicial discretion concerns which of these theories the Supreme Court should follow. I believe that the debate is clarified by focusing on these separate paradigms, rather than by lumping them together under the more general labels “interpretivism” and “noninterpretivism.” Each theory directs the intent. If concepts were based upon consensus or tradition, then conceptualism and cultural values theories would be indistinguishable. They are presented as separate theories because thus far they have been treated separately in the literature. Conceptualism has been explained as the notion that concepts should be derived from the Framers’ intent. See J. ELY, supra note 7, at 73-75 (announcing his intention to regard constitutional decisionmaking as process-bound rather than substantive).

See id. at vii, 73-77.

See supra text accompanying notes 88-132.

A deviation from the text of the Constitution is termed “contraconstitutional,” M. PERRY, supra note 8, at ix. The legitimacy of contraconstitutional decisionmaking is beyond the scope of this Article. Open-ended modernism assumes that judges will follow the text when it is clear. The text thus serves to create the outer boundary of constitutional interpretation. See Schauer, An Essay on Constitutional Language, 29 UCLA L. REV. 797, 828 (1982) (“Constitutional language can constrain the development of theory or set the boundaries of theory construction, without otherwise directing its development. Constitutional language can tell us when we have gone too far without telling us anything else.”).


Advocates of this approach include Professor Perry and Professor Tribe. See M. PERRY, supra note 8, at 93; L. TRIBE, supra note 49, at iii-iv.

It is important to distinguish “theories” of review from “methodologies” of review. The latter refers to interpretive principles such as the requirement that the Court follow precedent or that it articulate “neutral principles” to support its decisions. See Wechsler, Towards Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959). This Article assumes that the Court will continue to follow the principle of stare decisis and will continue to articulate principles to support its decisions under all of the “theories” outlined.
Court to the materials that may be considered in the interpretation\textsuperscript{197} of a constitutional issue and determines the manner in which the Court may use the materials.\textsuperscript{198} Thus, the chosen theory is supposed to inform the Court as to when it is to become involved in a dispute\textsuperscript{199} and how that dispute is to be resolved.\textsuperscript{200} Each of the six theories of judicial discretion provides different answers to these questions.

In evaluating these theories, it is important to keep in mind that this is 1984 and not 1787. The Court does not have the luxury of writing on a blank slate, and any shift in theories of judicial review involves certain costs. If earlier decisions are inconsistent with the prevailing theory, they can be overruled, but stare decisis will be sacrificed and doctrinal instability will be common. On the other hand, if earlier decisions are allowed to stand, the Court under the new theory might not adhere to them, thus creating inconsistencies in the law.\textsuperscript{201} For example, what happens to the right to privacy if a theory is adopted under which the Court cannot protect this right?\textsuperscript{202} Are earlier decisions protecting privacy overruled? Or is the right preserved, but not extended, in which case inconsistency seems inevitable? This is not to say that the Court is obligated to follow the theory that it has used primarily thus far.\textsuperscript{203} Rather, because there are costs in shifting paradigms, a presumption exists in favor of the theory that has been followed for almost two hundred years.\textsuperscript{204}

\textsuperscript{197} For example, a literalist may consult only the written text of the Constitution, but an originalist may look to the debates of the Framers.

\textsuperscript{198} For example, although an originalist would look to the Framers' debates to discern how they intended to resolve particular constitutional questions, a conceptualist would look to the debates only to derive general concepts to guide modern decisionmaking.

\textsuperscript{199} For example, a judge who believes in process-based modernism would permit judicial review of the merits of a controversy only if either the text or the history of the Constitution were violated or if process-based values were implicated.

\textsuperscript{200} Professor Lupu recently has written of the need to develop workable academic models for constitutional decisionmaking. \textit{See} Lupu, \textit{supra} note 82, at 619-20.

\textsuperscript{201} \textit{See} Monaghan, \textit{Taking Supreme Court Opinions Seriously}, 39 Md. L. Rev. 1 (1979); Monaghan, \textit{supra} note 141, at 130 (claiming that "it is far too late for views, which in the name of original truth, would revolutionize the existing constitutional order"); Munzer & Nickel, \textit{supra} note 179, at 1032 (stating that a "great deal of doctrinal and social disruption would result if one were to turn back the clock").

\textsuperscript{202} The right of privacy would not be justified under literalism (the text does not mention it), originalism (the Framers did not intend to protect it), or process-based modernism (it is a substantive value and not related to fair procedures).

\textsuperscript{203} One could argue that the Constitution includes not only what the Framers intended but also the "gloss" that has been added by subsequent Supreme Court decisions. \textit{See}, e.g., Daines & Moore v. Regan, 453 U.S. 654, 680-82 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Under this view, decisions that adopt particular theories are part of the Constitution and therefore should be followed. This seems to be an unsatisfactory way to decide matters of constitutional theory, however, because what has been done previously does not by itself indicate what normatively is best.

\textsuperscript{204} For a discussion of the importance of presumption in the resolution of controversies, see
Although each theory has been endorsed by individual Justices at different times in history, by far the dominant theory throughout American history has been open-ended modernism.\footnote{205} As Justice White once stated:

\[\text{T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done today is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, this is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.\footnote{206}}

Even those strongly opposed to the practice of open-ended modernism frankly admit that the Court has followed this paradigm throughout American history, especially in the last thirty years.\footnote{207} Thus, to a large degree the debate over judicial review concerns whether the Court should continue to use the open-ended modernism approach.

IV. Towards a Theory of Constitutional Adjudication

The debate over judicial review should not be, as it has been, a dispute over whether noninterpretivism can be reconciled with majoritarianism. Rather, it should concern which theory of judicial discretion is most appropriate. What criteria should be used in evaluating theories of judicial discretion? What is the proper basis for deciding which theory of judicial discretion is most desirable? In this section, I first will consider what the debate should \emph{not} be about; many of the traditional criteria for evaluating theories of judicial review are inappropriate and misleading. Second, I will outline questions that can lead to a profitable discussion about the appropriate scope of judicial discretion.

\footnote{Patterson & Zarefsky, Contemporary Debate (1982); Whately, Presumption and Burden of Proof, in Readings in Argumentation 26-29 (J. Anderson & P. Dovre eds. 1968).}

\footnote{205. For a discussion of how the Court has followed open-ended modernism throughout history, see Grey, Do We Have an Unwritten Constitution?, 77 Stan. L. Rev. 703, 707-08, 713 (1975); Shaman, The Constitution, the Supreme Court, and Creativity, 9 Hastings Const. L.Q. 257, 258-66 (1982). Professor Shaman writes:

Constitutional law is a dynamic process of creativity. Through the continual interpretation and reinterpretation of the text of the document, the Supreme Court perpetually creates new meaning for the Constitution. . . . Notwithstanding the orthodox protestation that it is illegitimate for the Court to "revise" or to "amend" the Constitution, this is in fact what the Court has always done by continually creating new constitutional meaning.

\textit{Id.}\textsc{ at} 258.}


\footnote{207. See, e.g., R. Berger, supra note 4; Kurland, supra note 17, at 12; Winter, The Growth of Judicial Power, in The Judiciary in a Democratic Society 39, 49 (L. Theberge ed. 1979).}
A. What the Debate Is Not About: More Wrong Questions

Many scholars and judges have argued that a particular theory of judicial review is appropriate because it prevents judges from imposing their own values, it prevents "judicial tyranny," or it assures the continued legitimacy of the Court. None of these three criteria is useful in deciding which theory of judicial review is best.

1. Indeterminacy.—Almost every scholar advocating a model of judicial review argues that the particular theory is desirable because it does not permit judges to decide cases on the basis of their personal values. Scholars defend these theories on the ground that they avoid open-ended modernism and limit judicial discretion by providing a determinate result in constitutional cases. This argument is useless, however, because all theories of judicial review are indeterminate. No theory can prevent Justices from resolving issues on the basis of personal values. In fact, each theory was developed, to a large extent, because prior theories failed to provide determinacy.

(a) Literalism.—Literalism requires the Court to decide cases solely on the basis of the text of the Constitution. This model is intended to minimize judicial discretion and ensure determinacy by requiring that the Justices do no more than strictly apply the relevant constitutional provisions. Unfortunately, literalism usually fails to achieve determinacy because of the inherent vagueness and ambiguity of language. As Chief Justice John Marshall noted early in America's constitutional history:

Such is the character of human language that no word conveys to the mind, in all situations, one single, definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in this rigorous sense, would convey a meaning different from that which is obviously intended.

This indeterminacy is especially apparent in phrases like "due process of law" or "equal protection." Because these terms have no

208. See, e.g., J. Ely, supra note 7, at 44-48 (widespread rejection of the idea that judges can impose their own values in constitutional adjudication); M. Perry, supra note 8, at 123 (judicial theories motivated by fear of judges deciding cases based on personal beliefs); Bork, supra note 4, at 6 ("We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices.").

209. See supra text accompanying notes 175-77.

210. For an excellent discussion of problems in interpreting language literally, see Moore, supra note 48, at 181-202 (discussing ambiguity, metaphors, vagueness, and open-texture as problems of interpretation).

determinate meaning, a “literal” reading of the Constitution cannot guide the Court in construing them.212 Even the constitutional language that is more specific is indeterminate. For example, Justice Black often endorsed a literal interpretation of the first amendment, declaring, “I read ‘no law abridging freedom of speech’ to mean no law abridging.”213 But, as Professor Fiss points out, this phrase is hardly unambiguous: “Does ‘speech’ embrace movies, flags, picketing and campaign expenditures? What is meant by freedom?”214 Furthermore, does the language “Congress shall make no law” mean that the Executive can infringe freedom of speech? Similarly, when the Constitution speaks of “Commerce . . . among the several States,”215 does that mean commerce between the states (interstate commerce),216 or does it mean commerce among, within, the states (including interstate and intrastate commerce)?217 Does the term “commerce” refer to all business activity or just one stage of business, such as mining, manufacturing, or production?218 In deciding cases, the Court must choose a meaning for such words, and literalism provides no guidance. In fact, “issues are brought before courts precisely because the written text is not determinative.”219 As Professor Shaman observes: “Given the generality and abstractness of the Constitution, it should not be surprising that its text is of little assistance in dealing with the vast majority of constitutional issues.”220


(b) Originalism.—Because of literalism’s indeterminacy, theorists developed originalism, which permits construction of vague constitutional provisions on the basis of the Framers’ intent. This method attempts to follow the traditional practice of statutorily construction; that is, when the text of a statute is unclear, its meaning should be deter-

212. See Leeds, The Supreme Court Mess, 57 Texas L. Rev. 1361, 1398 (1979) (“A literal interpretation of the Constitution is often impracticable.”).


214. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 743 (1982). Professor Brest offers an excellent example of the ambiguity of a seemingly clear provision. Does the requirement that the President be a “naturally born” citizen, U.S. Const. art. II, § 1, prohibit those born by Caesarean section from becoming President (which is possible in a culture that believes such individuals to be inferior)? The point is that, given the ambiguity of language, the Court would have no basis to rule out such an interpretation if it follows literalism. See Brest, supra note 147, at 207.


217. See 1 W. Crosskey, supra note 141, at 51, 74-80.


220. Shaman, supra note 205, at 267.
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mined by the intent of the drafters as indicated by pre-adoption history. Unfortunately, as applied to constitutional interpretation, originalism fails to achieve determinacy.

The initial indeterminacy problem with originalism stems from the inability to determine who the Framers were and what they intended.\textsuperscript{221} Whose intent should matter in interpreting the Constitution? The process of ratification included not just Congress and the drafters of a provision, but also the states. Professor Wofford explains:

[[If we are really searching for the states of mind of those responsible for the presence in the Constitution of a particular provision, it is hard to understand why we should be particularly concerned only with who drafted the provision or supported it actively. Responsibility is more widely distributed; in order to become part of the Constitution, the provision had to be accepted by the Philadelphia Convention or by the Congress, and then ratified by the states acting either through the legislatures or through special conventions. Yet, to admit the relevance of such a large number of states of mind is to set forth a task virtually impossible to fulfill.\textsuperscript{222}]

In short, because “so many different people in so many different circumstances” are part of ratification, “one cannot hope to gather a reliable picture of their intentions from any perusal of the legislative history.”\textsuperscript{223}]

Furthermore, even if the Court decided whose intent mattered, it often would be difficult to discern those intentions, because the Framers undoubtedly had a number of different and perhaps conflicting reasons for adopting a particular constitutional amendment.\textsuperscript{224} A workable theory of originalism assumes that there is a concrete and knowable intent of the Framers waiting to be found,\textsuperscript{225} but the histori-

\textsuperscript{221} In practice, however, literalism and originalism are “mutually antagonistic approaches to interpretation” because one forbids use of extratextual material and the other requires use of such sources. Brest,\textit{ supra} note 147, at 223.


\textsuperscript{223} J. Ely,\textit{ supra} note 7, at 17; see also Dworkin,\textit{ supra} note 1, at 481 (noting that “we have no fixed concept of a group intention that makes what the Framers intended simply a matter of pure historical fact”).

\textsuperscript{224} See Dworkin,\textit{ supra} note 1, at 477 (noting that “there are no, or very few, relevant collective intentions, or perhaps only collective intentions that are indeterminate rather than decisive one way or the other”).

\textsuperscript{225} See Saphire,\textit{ supra} note 129, at 778 (“There is no such thing as a concrete and knowable intent of the framers—at least when that intent is defined as the collective, conscious, subjective state of mind of at least a majority of the persons who voted to adopt and ratify the Constitution.”). In fact, Kenneth Arrow’s Impossibility Theorem demonstrates that it is impossible to construct a set of social preferences out of the preferences of individual members of a group. See Arrow,\textit{ A Difficulty in the Concept of Social Welfare}, 58 J. POL. ECON. 328 (1950); see also A. Feldman,\textit{ Welfare Economics and Social Choice Theory} 178-95 (1980); cf. Easterbrook,
cal materials are inadequate to permit such determinations. As Justice Jackson observed: "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."226

In addition, the world today is far different from what it was when the Constitution was adopted. For example, it is absurd to try to find the Framers' intent concerning the regulation of the broadcast media,227 yet originalism requires that all constitutional interpretation be based entirely on preratification history.228 Thus, in deciding whether the "fairness doctrine" is constitutional, the Court could not achieve a determinate result by relying on a theory of originalism.229

It is not only technological changes that render originalism inadequate. For example, Professor Saphire recently asked how an originalist would deal with article II of the Constitution, which speaks of the President as "he."230 In light of the Framers' attitude toward women's participation in politics (women did not even vote until 1920), "they would have understood Article II to exclude women from presidential eligibility."231 In other words, an originalist reading would declare unconstitutional the election of a female President. Perhaps an originalist would claim that this is not an attack on the theory's lack of determinacy, because there is a Framers' intent that could be followed. In that event, originalists gain determinacy, but at the price of absurdity. It is

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226. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). As Professor Shamian explains, "[T]here are considerable difficulties in discerning what in fact the Framers intended. The Journal of the Constitutional Convention, which is the primary record of the Framers' intent, is neither complete nor accurate. The notes for the Journal were carelessly kept and have been shown to contain several mistakes." Shamian, supra note 205, at 267.

227. See Saphire, supra note 139, at 769. Professor Brest notes that under originalism, "Congress could not regulate any item of commerce or any mode of transportation that did not exist in 1789; the first amendment would not protect any means of communication not known then." Brest, supra note 147, at 221; see also Miller & Howell, The Myth of Neutrality in Constitutional Adjudication, 27 U. CHI. L. REV. 661, 683 (1960) ("A nation wholly different from that existing in 1787, facing problems obviously not within the contemplation of the Founding Fathers, can scarcely be governed—except in the broadest generality—by the concepts and solutions of yesteryear.")

228. See supra text accompanying notes 178-81. To interpret the Constitution based on how the Framers would have dealt with modern problems is conceptualism, not originalism. See supra text accompanying notes 182-84.

229. See, e.g., Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Framers obviously could not have had any intent concerning the problems of scarcity of electromagnetic frequencies, which was the basis of the Court's decision.

230. Saphire, supra note 139, at 796-97; see U.S. CONST. art. II, § 1.

231. Saphire, supra note 139, at 796-97.
unthinkable that the Court would invalidate the election of a female President in this way.\textsuperscript{232}

Finally, and most importantly, it cannot be known whether the Framers intended for originalist principles to guide constitutional interpretation. Originalism requires that the Constitution be interpreted in accord with the Framers' intent.\textsuperscript{233} Thus, if the Framers intended that subsequent generations use a model other than originalism, the originalists' premise forces them to abandon their theory. Because we may never know what theory of interpretation the Framers wanted future Courts to use,\textsuperscript{234} originalism is unworkable. In fact, it is likely that the Framers intentionally phrased many important constitutional provisions in an open-ended, indeterminate fashion, leaving them "to gather meaning from experience."\textsuperscript{235} Those committed to originalism are obligated to abandon it, because the Framers probably did not intend the Constitution to be interpreted on the basis of their expectations.\textsuperscript{236}

\textbf{(c) Conceptualism.}—The failure of originalism led to the development of "conceptualism." Rather than confine interpretation to the specific desires of the drafters, "conceptualists" believe that the Court

\begin{flushright}
232. This example is not atypical. In \textit{Brown v. Board of Educ.}, 347 U.S. 483 (1954), the Court was confronted with the reality that education in 1954 was so totally different from that in 1868 that the Framers' intent was irrelevant. Education had become far more important; it had become a government responsibility whereas previously it had been a mostly private concern. \textit{Id.} at 491-92. Thus, the Court concluded, "In approaching this problem, we cannot turn the clock back to 1869 when the Amendment was adopted or even to 1896 when \textit{Plessy v. Ferguson} was written." \textit{Id.} at 492.

233. \textit{See} \textit{Brett, supra} note 99, at 1090 ("There is no reason to suppose that the adopters of the Fourteenth Amendment intended its provisions to be interpreted by Berger's strict intentionalist canons. . . . Thus, fidelity to their intentions may require an interpreter to eschew detailed inquiry into the adopters' particular views. . . .").

234. \textit{See} M. Perry, supra note 8, at 74 (contending that there is no indication of how the Framers wanted the Constitution to be interpreted).


236. Originalists cannot achieve their primary objective of limiting judicial discretion. History inevitably is unclear and historical materials often justify any interpretation. As Professor Dworkin writes:

\begin{quote}
[T]he idea with which we began, that judges can make apolitical constitutional decisions by discovering and enforcing the intention of the framers, is a promise that cannot be sustained. For judges cannot discover that intention without building or adopting one conception of constitutional intention rather than another, without, that is, making the decisions of political morality they were meant to avoid.
\end{quote}

Dworkin, supra note 1, at 498. For example, there is a great dispute about the meaning of the fourteenth amendment. Raoul Berger advances one view, R. Berger, supra note 4, but numerous commentators challenge his historical conclusions and offer alternative interpretations. \textit{See}, e.g., Dimond, \textit{Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds}, 80 Mich. L. Rev. 462, 463 n.7 (1982) (a response to Berger and a partial listing of other replies).
should identify the Framers' general purpose and then apply that purpose to modern circumstances to decide specific cases. Professor Dworkin, for example, argues that each constitutional provision contains a core "concept" from which subsequent generations can develop their own particular "conceptions":

Suppose I tell my children simply that I expect them not to treat others unfairly. I have no doubt have in mind examples of conduct I mean to discourage, but I would not accept that my "meaning" was limited to these examples. . . . First I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act that I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of the latter. . . . I might say that I meant the family to be guided by the concept of fairness, not by any specific conception of fairness that I had in mind.

In short, the Court should derive from each constitutional provision a general purpose or concept, but then develop its own conception to decide particular cases.

This theory is beset by the same indeterminacy that plagues originalism. It will often be impossible to discern what concept the Framers intended. In fact, the notion of "concept" is so vague that different Framers probably would have articulated radically different "concepts" for a particular constitutional provision.

Conceptualism is indeterminate because the Court can state the concept behind any constitutional provision at several different levels of generality. For example, the equal protection clause may represent the concept that blacks are entitled to treatment equal to whites. It also could reflect the concept that groups that had been enslaved, as blacks were, should receive equal treatment. The clause

237. Professor Bork, for example, uses this theory to defend the Supreme Court's decision in Brown v. Board of Education. See Bork, supra note 4, at 14-15.
238. R. DWORKIN, supra note 183, at 134-36.
239. Id. at 134.
240. Some authorities advocate further limitation of the Court's discretion. They argue that the Court should try to discern the particular conceptions that the Framers would have chosen if they had been confronted with modern circumstances. For a discussion of why this added limitation would be no different and would impose no greater constraint on judicial decisionmaking, see infra text accompanying notes 251-52.
241. See Brest, supra note 218, at 789.
243. See, e.g., Strauder v. West Virginia, 100 U.S. 303, 307 (1879) (fourteenth amendment's purpose is to prevent discrimination against blacks).
244. See, e.g., Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (fourteenth amendment's purpose is to ensure freedom for former slaves).
might mean that racial discrimination is impermissible against all racial minorities, or that groups that are "insular" political minorities should be constitutionally protected. Most generally, the clause may embody the concept that all discrimination must be justified by some legitimate governmental purpose. Each is a plausible interpretation of the underlying concept or purpose of the equal protection clause, and at various times each has been endorsed by the Supreme Court.

The result in specific cases frequently will depend on the level of generality at which the concept is articulated. If the equal protection clause is intended only to protect blacks or former slaves, then the fourteenth amendment offers no basis for judicial protection of women. Alternatively, if the concept of equality is stated more generally, the Court is obligated to scrutinize gender discrimination carefully. Conceptualism "demands an arbitrary choice among levels of abstraction." This choice allows judges to find in any constitutional provision concepts so general that they permit any result.

Conceptualism inevitably fails to achieve its primary purpose of avoiding open-ended modernism. Permitting the Court to determine how the Framers would have dealt with modern problems is inherently indeterminate and therefore offers no guide for judicial discretion. Professor Tushnet recently explained:

The project of imaginative transposition can be carried through in a number of ways, with a number of different results, none of which is more "correct" than the others. The existence of such an indeterminacy means that interpretivism . . . cannot constrain judges sufficiently to carry out the liberal project of avoiding judicial tyranny. . . . Interpretivists claim that their approach is at least able to limit judges, but, by allowing judges to look hermeneutically for functional equivalents, interpretivism reintroduces the discretion that it was intended to eliminate.

245. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (equal protection clause applies to discrimination on basis of race or national origin).
249. Brest, supra note 99, at 1092 ("The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles and all such choices are inherently non-neutral.").
250. See Monaghan, supra note 143, at 378 (describing process of "conceptualizing original intent at a level of abstraction, that in effect, removes it as an institutional constraint").
251. See Brest, supra note 99, at 1092.
252. Tushnet, supra note 248, at 793, 802.
Conceptualism, too, fails to achieve determinacy. 253

(d) Cultural values.—Recognizing the failure of these approaches, some theorists have abandoned constitutional interpretation based on the Framers’ intent. Instead, they argue that the Court should look to “deeply embedded cultural values” in interpreting the open-ended clauses of the Constitution. 254 They propose various sources for determining such values, including natural law, tradition, and consensus. 255

This theory is indistinguishable from open-ended modernism. Natural law, tradition, and consensus are all indeterminate, permitting judges to reach any result. Certainly the Court should justify its conclusions in terms of important social values, 256 but the cultural values theory does not place any constraints on judicial decisionmaking; cultural values can be identified to support almost every conclusion.

Natural law, for example, is not comprised of specific, judicially discoverable principles. To the contrary, people can claim that any idea is a part of the natural order. As Dean Ely explains, “natural law has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue.” 257 Ely offers an excellent example, quoting the Supreme Court’s decision in Bradwell v. Illinois: “The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.” 258 Asking judges to follow natural law gives them license to discover the values they believe should be protected, an approach no different from that of open-ended modernism.

Nor is the requirement that the Court look to tradition a constraint on judicial decisionmaking: American history is so diverse that almost any value can be found in some tradition. As Garry Wills notes: “[R]unning men out of town on a rail is at least as much an American

253. Conceptualism has other potential inconsistencies. For instance, if the Framers did not intend for their concepts to be followed, or if they intended adherence to their conceptions, or if their concepts were so specific that they allowed little room for future innovation—any of these possibilities would doom the theory of conceptualism. See M. Perry, supra note 8, at 70-75.

254. G. White, supra note 189, at 160. Dean Wellington is one of the most prominent advocates of this approach. See, e.g., Wellington, supra note 186, at 284.

255. Dean Ely superbly criticizes this theory in all of its variations. See J. Ely, supra note 7, at 48-69.

256. This discussion does not deny that the purpose of judicial review is to articulate crucial social values and protect them from majority rule. Rather, the point is that this process is indistinguishable from open-ended modernism and should be regarded as such.

257. J. Ely, supra note 7, at 51.

258. Id (quoting 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring)).
tradition as declaring unalienable rights."\textsuperscript{259} Similarly, discrimination against women and blacks is far more an American tradition than is egalitarianism. Permitting decisions based on tradition allows the Court to justify its arbitrary choices simply by invoking an historical practice as support.\textsuperscript{260}

Finally, consensus seems a peculiar approach to limiting judicial discretion, because the whole point of judicial review is to check the majority. If there is a consensus in favor of lynchings, does that mean lynchings are constitutional?\textsuperscript{261} Dean Ely explains the inherent inconsistency in the use of consensus as a basis for judicial review: "[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."\textsuperscript{262} If consensus is expressed in the enactment of statutes by popularly elected legislatures, then a consensus model provides no basis for judicial review of those statutes. Alternatively, if consensus is determined by Justices deciding what they believe most people want, then the Court can do whatever it pleases and say that it has consensus on its side. One "can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported."\textsuperscript{263}

\textit{(e) Process-based modernism.}—Process-based modernism allows the Court to use contemporary norms in deciding cases, but only in creating a fair process of government. Under this theory, advanced by Dean Ely, the Court is not allowed to make substantive value choices. Instead, it serves solely to create a fair process, either by providing "procedural fairness in the resolution of individual disputes" or by "ensuring broad participation in the processes and distributions of government."\textsuperscript{264}

This Article explained earlier why this theory is indeterminate.\textsuperscript{265}

\textsuperscript{259} G. WILLS, INVENTING AMERICA xiii (1978), quoted in J. ELY, supra note 7, at 60.

\textsuperscript{260} Tradition offers no basis for solving new social problems, nor does it provide the Court with any grounds for striking down an unconstitutional practice that has long existed, but has not been previously challenged.


\textsuperscript{262} J. ELY, supra note 7, at 69. Consensus theories often are more complex and sophisticated than this brief discussion indicates. Many scholars are now writing on the need for a coherent consensus. See, e.g., Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. CAL. L. REV. 1176 & n.109 (1981); Wellington, supra note 186, at 67. Nonetheless, the basic point is the same: there is no determinate way to identify a consensus of any type.

\textsuperscript{263} Wellington, supra note 186, at 67.

\textsuperscript{264} J. ELY, supra note 7, at 87.

\textsuperscript{265} See supra subpart II(B)(2).
First, it does not provide the Court with a basis for interpreting the substantive provisions of the Constitution. Second, it does not achieve the goal of judicial deference to the substantive values chosen by popularly elected officials. As discussed earlier, the Justices inevitably make substantive value judgments in applying the process model. In fact, they make exactly the same judgments as they would under open-ended modernism; almost any judicial decision can be justified under the process model. In practice, process-based modernism does not differ from open-ended modernism.

No theory of judicial review can avoid indeterminacy. Determinacy is thus a useless criterion for evaluating theories of judicial discretion. This is not to suggest that because open-ended modernism is the only theory that openly admits its indeterminacy, it is the best theory. Rather, the search for determinacy is misguided, because constitutional cases arise only when the meaning of the Constitution is unclear and there is no determinate solution to the constitutional question.

2. Judicial Tyranny.—Many scholars and judges oppose a particular theory of judicial discretion by claiming that it leads to “tyranny by the judiciary.” Avoiding judicial tyranny is offered as a key criterion in deciding which theory of judicial discretion is best. “Tyranny” is a loaded word, however, and anyone who uses the term must define it. Does it mean that the Court will become a tyrannical dictator, running the country by fiat? This seems unlikely because the Court has no ability to act directly and acts only on those cases before it. Obviously, the Court cannot arrest people, confiscate property, or declare war. Moreover, if the Court orders the President or Congress to act tyrannically, each can ignore the order. “Judicial tyranny” can be understood only as a fear that the Court will frustrate the will of

266. See supra text accompanying notes 94-106.
267. See supra text accompanying notes 107-121.
268. See id.
269. See supra text accompanying notes 94-121.
270. Professor Perry, for example, repeatedly uses the phrase “judicial tyranny.” See M. Perry, supra note 8, passim. Raoul Berger titled his book criticizing judicial activism Government by Judiciary. See R. Berger, supra note 4. Conservative critics of judicial activism label such practices “tyranny by the judiciary.”
271. The notion of “judicial tyranny” is interrelated with the idea of indeterminacy. Those who oppose indeterminacy do so because they believe that judges’ ability to decide constitutional cases based on their personal values amounts to tyranny by the judiciary. Hence, if “judicial tyranny” means simply indeterminacy, the criticism is meaningless because all theories of judicial review are indeterminate. See supra text accompanying notes 208-69.
272. See A. Bickel, supra note 27, at 28 (noting that “huge areas of governmental action remain wholly outside [the Court’s] reach”).
273. See Wright, supra note 2, at 11.
the majority by striking down socially desirable legislation on the basis of misguided constitutional interpretations. This is a legitimate fear, but it is the specific concern over misguided judicial activism that must be analyzed, not some vague notion of "tyranny."

In considering this objection, it should be recognized that the Court is not tyrannical merely because it acts in an antimajoritarian fashion, for judicial review is supposed to be antimajoritarian. Rather, the concern is that the Court will strike down socially important legislation, a mistake that cannot be corrected easily because of the difficulty of overruling constitutional decisions through the amendment process. In fact, this fear seems to be the underlying motive for almost all contemporary constitutional theory. The desire to devise a model that limits judicial discretion is inspired by the perceived need to constrain the Court and thus avoid another Lochner era. Commentators are searching for a theory that will permit judicial review without the risk of Lochnerism.

This concern over the possibility of judicial mistakes must be put in perspective. First, if the risk of errors is a criterion for evaluating theories of judicial discretion, the question is whether a particular theory is more likely than other theories to endanger desirable social policies. The Court in Dred Scott v. Sandford explicitly premised its decision on originalism. Lochnerism could be justified under originalism (the Framers' intent to limit government and protect contracts), conceptualism (the concept of "freedom of contract"), or the cultural values theory (natural law or the tradition against regulation). Simply put, errors are equally possible under any approach.

274. See supra text accompanying notes 160-65.
275. See Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours legislation for bakers). This decision is symbolic of the period from the late nineteenth century until 1937, during which the Court overturned needed federal and state social legislation. See L. Tribe, supra note 49, at 45-36 (discussing use of term "Lochner era").
277. 60 U.S. (19 How.) 393 (1857) (invalidating the Missouri Compromise and declaring that slaves are not United States citizens).
278. Id. at 426 ("No one, we presume, supposes that any change in public opinion or feeling . . . should induce the court to give to the words of the constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.")
Second, although judicial errors are possible, so are legislative and executive ones. 279 Professor Fiss notes that "[h]istory is as filled with legislative and executive mistakes as it is filled with judicial ones." 280 The crucial question becomes which risks of error are more acceptable. Is society better off limiting judicial review and trusting the majority to restrain itself and not to violate constitutional provisions? Or should society grant the power of judicial review and trust the Court not to err by unjustly overruling desirable social policies? If the choice of constitutional theory is based on the risk of errors, these are the crucial questions that must be faced. 281

Third, if the Court is denied discretion in order to prevent mistakes, it is also denied discretion to make good decisions. 282 For example, many of the theories discussed above would not have permitted the Court to outlaw school desegregation 283 or to protect the right of privacy. 284 Are critics of judicial activism saying that the values of desegregation and privacy are unimportant? Or are they saying that the legislatures would have protected these rights adequately without court action? Neither of these assumptions seems plausible. The argument must be that the risk of errors is so great that it outweighs the benefits of discretion. This claim has not been proven and no one has even suggested a methodology for balancing the risks of bad decisions against the benefits of desirable ones.

Finally, underlying the desire to avoid judicial tyranny is the assumption that there are no checks on the judiciary apart from the selected theory of review. That is, it is assumed that there is no way to

279. See Shaman, supra note 205, at 278 ("The Court has made its mistakes, including a few egregious ones, but so have the other branches of government.").


281. As Professor Tribe states,

The price we pay is that, for various periods of time, an enlightened consensus may be blocked by judicial adherence to constitutional views we will later come to regret. But the price of the alternative course is that, for other periods, the enlightened consensus that judges may help to catalyze in the name of the Constitution might be blocked by more self-interested or self-serving majorities.


282. See R. Dworkin, supra note 183, at 130 (noting the argument "that because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones"). Some commentators have argued that, overall, the Court has done well in protecting basic rights. See, e.g., M. Perry, supra note 8, at 117; Wasby, Arrogation of Power Accountability: Judicial Imperialism Revisited, 65 JUDICATURE 209, 210 (1981).

283. Originalists would argue that Brown was decided wrongly because the Framers of the fourteenth amendment did not intend to desegregate the schools. See, e.g., R. Berger, supra note 4, at 117-33.

284. Originalists would oppose a judicially created right of privacy. See, e.g., Bork, supra note 4, at 8-9. Similarly, the right of privacy seems unacceptable under a process-based model because it is substantive and not procedural.

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limit judicial errors except through the model of review. This assumption is unfounded; limits on judicial discretion exist apart from the theory of judicial review selected\textsuperscript{285}—both internal and external constraints.\textsuperscript{286}

Internal limits consist of norms of proper Court behavior that the Justices feel obligated to follow.\textsuperscript{287} Although theoretically the Court could ignore these self-imposed norms, studies demonstrate that norms that are part of social roles are usually followed and significantly constrain behavior.\textsuperscript{288} These internal limits require that the Court articulate reasons for its decision.\textsuperscript{289} Specifically, the Court must write an opinion demonstrating that its decision is not arbitrary. The Court must explain both why the values it is protecting are worthy of constitutional status and how those values are embodied in legal principles.\textsuperscript{290} Additionally, the Court must come to a decision that is consistent with prior holdings, is legitimately distinguishable from precedents, and are able to articulate reasons for the Court's reasoning.

Braden, The Search for Objectivity in Constitutional Law, 57 Yale L.J. 571, 574 (1948).

286. These are not constraints in the same sense that alternate models of judicial discretion attempt to limit discretion. First, the alternate models attempt to prevent judges from imposing their own values. This Article concedes that judges do impose their own values and merely argues that there is some limit on what judges can do. Second, the alternate models of judicial discretion seek to constrain the Court in order to reconcile judicial review with democratic majority rule, which this Article contends is impossible. It is hyperbole to say that there are no limits on the Court under open-ended modernism, because some outer boundaries that limit discretion do exist.

287. See infra text accompanying notes 288-91.

288. A "role" is the set of norms that defines the proper behavior of each person in a particular situation or position. Social psychologists and organizational theorists have developed the concept of role to explain how the definition of a person's task influences the way that person performs. See H. Simon, Administrative Behavior 110-53 (1957); Sarbin & Allen, Role Theory, in Handbook of Social Psychology 488-558 (G. Lindsey ed. 1968). Experimental literature consistently has identified a positive relationship between role expectations and behavior. See Kelman, Three Processes of Social Influence, in Current Perspectives in Social Psychology 454 (E. Holland & R. Hunt eds. 1973); Reeder, Donohue & Biblarz, Conceptions of Self and Others, in Society and Self 69 (B. Strodey ed. 1962).


290. See Golding, Principled Decision-Making and the Supreme Court, 63 Colum. L. Rev. 35, 40-41 (1963); Wechsler, supra note 196, at 19.
or that justifies overruling conflicting cases.\textsuperscript{291}

Most commentators seem to overlook how much these internal requirements constrain judicial decisionmaking.\textsuperscript{292} A key difference between the Court and a legislature is that only the former must articulate principles for its decisions; only the Court need worry about stare decisis. A legislature is allowed, even expected, to make arbitrary choices unsupported by a guiding principle. Even if all of the Court's constitutional decisions are merely reflections of hunches or personal predilections,\textsuperscript{293} however, the Court still must justify those conclusions in legally acceptable terms.\textsuperscript{294} Again, while the Court theoretically can ignore these internal limits, these norms are part of the role definition of proper judicial behavior and thus are likely to constrain judicial decisionmaking.

External constraints on judicial discretion arise from the interaction of the Court with other branches of government. For example, the Court often must depend on the other branches of government to enforce its decisions.\textsuperscript{295} As Alexander Hamilton noted in his famous \textit{Federalist No. 78}: "The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."\textsuperscript{296} The Court always must be mindful of the fact that its decisions can be ignored.\textsuperscript{297} The need to hand down decisions that will be

\textsuperscript{291} See Braden, \textit{supra} note 285, at 576; Saphire, \textit{supra} note 139, at 788 (noting that precedents "can and do have the effect of disciplining judicial reasoning").

\textsuperscript{292} For example, Professor Choper, Dean Ely, and Professor Perry all discuss judicial discretion without explicitly analyzing the requirement of a written opinion as a constraint. See J. Choper, \textit{supra} note 2; J. Ely, \textit{supra} note 7; M. Perry, \textit{supra} note 8.

\textsuperscript{293} Many have suggested that judicial decisions are merely public rationalizations for hunches. See, e.g., W. Douglas, \textit{The Court Years} 8 (1980); J. Frank, \textit{Law and the Modern Mind} 148 (1930); Hutcheson, \textit{The Judgment Intuitive: The Function of Hunch in Judicial Decision}, 14 Cornell L.Q. 274 (1929).

\textsuperscript{294} See R. Wasserstrom, \textit{The Judicial Decision} 25-30 (1961). Dean Ely criticizes decisions based on a moral analysis. He claims that it would be undesirable for the Court to decide cases by saying, "We like Rawls, you like Nozick. We win, 6-3." J. Ely, \textit{supra} note 7, at 58. The reason that this is undesirable is not because Rawls' theory is an impermissible basis for determining constitutional values, but because the Court should give reasons for its conclusions and should justify, with legal principles, its adherence to a particular theory.

\textsuperscript{295} Professor Wright notes:

Indeed, if the Court is too far out of touch with the people, the Congress and the Executive can annul its directives simply by refusing to execute them, or the people can do so by constitutional amendment. In sum, although the Court is not politically responsible, it is likely to be politically responsive.

Wright, \textit{supra} note 2, at 11.

\textsuperscript{296} \textit{The Federalist} No. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

\textsuperscript{297} Dean Choper offers examples of such nullification of judicial decisions:

The presidential response may range from Abraham Lincoln's outright refusal to obey Chief Justice Taney's order in \textit{Ex parte Merryman}, to Franklin Roosevelt's plan to openly defy the full bench if it ruled adversely in the \textit{Gold Clause Cases} . . . to Andrew
obeyed serves as an external limit on judicial discretion.

Judicial discretion is externally controlled also when Presidents appoint Supreme Court Justices with an eye toward how they will exercise their discretion on the bench. Although this control is imprecise, there are examples of Presidents using the appointment power to alter drastically the Court's performance. In addition, the power to overturn Supreme Court decisions by constitutional amendment provides a final external check on judicial discretion.

My point is not that these internal and external constraints eliminate all Court discretion or that they provide means by which the political branches oversee judicial actions. Admittedly, these constraints serve only as outer limits on Court behavior; within these limits the Court still possesses tremendous discretion. The key point is that some checks on judicial decisionmaking do exist even under open-ended modernism. Thus, those who argue against a particular theory based on the fear of judicial tyranny must demonstrate that these checks are inadequate to prevent serious, repeated judicial errors. As Professor Dworkin observes:

[Although] we run a risk that the judges may make wrong decisions . . . [w]e must not exaggerate the danger. Truly unpopular decisions will be eroded because public compliance will be grudging . . . and because old judges will retire or die and be replaced by new judges because they agree with a President who has been elected by the people.

3. Judicial Credibility.—Some scholars and judges argue that the Court must choose a theory of judicial discretion that will preserve and

Jackson's alleged edict that he would leave John Marshall to enforce his own decision in the *Cherokee Indian Cases,* to Dwight Eisenhower's seeming ambivalence immediately following the *School Desegregation Cases.*

J. CHOPER, supra note 2, at 56.

298. Over the whole history of the Court, on the average one new justice has been appointed every twenty-two months. The fact is, then, that the policy views dominant on the Court are never far out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently, it would be most unrealistic to suppose that the Court would, for more than a few years at most, stand against any alternative sought by a lawmaking majority.


299. Two relatively recent examples are President Roosevelt and President Nixon, whose appointments greatly altered the course of constitutional decisions.

300. Constitutional amendments have been enacted to overturn Supreme Court decisions in four instances. See *supra* note 155.

301. Usually, these constraints are criticized as inadequate because of the amount of discretion the Court retains. But these constraints are not intended to eliminate judicial discretion; such discretion is essential if the Court is to perform effectively its task of adapting the Constitution to changing circumstances.

302. R. DWORKIN, supra note 183, at 148.
enhance the Court's institutional legitimacy. They believe that because the judiciary cannot enforce its rulings, other branches of government will comply only with the decisions of a Court that maintains its credibility. Without this credibility, judicial decisions will be disobeyed and the Court will become an ineffective institution.

The concept of legitimacy is an empirical notion, however, requiring measurement of the degree of support for the Court's decisions and the extent of disobedience that corresponds to various levels of support. In other words, arguments about legitimacy require an analysis of which types of decisions will produce what degrees of respect or disrespect for the Court. Yet those who use the concept offer no empirical support for their conclusion that particular theories of judicial discretion will undermine the Court's legitimacy.

Furthermore, arguments about judicial legitimacy wrongly assume that the Court's credibility is related directly to its theory of decision-making. In fact, few besides academics pay close attention to the theoretical underpinnings of decisions. Instead, the Court's legitimacy is attributable largely to the results of particular decisions and the methods used to reach those results. If these results are unacceptable over a long period of time, the Court's legitimacy will suffer regardless of the theory of judicial review used. Conversely, if the results are agreeable, the Court's credibility will be enhanced. Additionally, the Court's credibility seems to rest upon the popular perception of the Court as free from political pressure, bound by the convention of issuing written opinions, and capable of protecting people from arbitrary government. The Court can establish its legitimacy by writing persuasive opinions that justify its conclusions. Hence, as long as the Court follows this socially accepted judicial role, it is likely to retain its legitimacy regardless of the theory of judicial discretion that it employs.

In fact, history demonstrates that even open-ended modernism, the theory regarded as most dangerous to judicial legitimacy, has not

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303. See, e.g., A. BICKEL, supra note 27, at 201-68 (noting the importance of the Court acting to preserve judicial legitimacy); J. CHOPER, supra note 2, at 59 ("The great task, then, for the Court . . . is how best to reject majority will when it must, without endangering not only that critical role but its other urgent duties as well.");

304. See, e.g., Sapphire, supra note 42, at 796 ("[A] candid confession of the policymaking nature of noninterpretive review may not only undermine its ability to protect human rights . . . but may also adversely affect its ability to perform an interpretive function.");


306. See, e.g., J. ELY, supra note 7, at 47 (discussing the frequency of arguments based on judicial legitimacy); Kurian, Toward a Political Supreme Court, 37 U. CHI. L. REV. 19, 20 (1969); Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363, 1366 (1973) (asserting that "frequent intervention in the political process would generate such widespread political reaction that the Court would be destroyed in its wake").
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damaged that legitimacy or led to disregard of Court decisions. As explained earlier, open-ended modernism has been used by the Court since the beginning of American history. Although the Court has admitted explicitly that it protects certain rights neither stated nor implied in the Constitution, it has retained its legitimacy. As Judge Gibbons explains: “The historical record suggests that far from being the fragile political institution that scholars like Professor Choper... and Alexander Bickel have perceived it to be, judicial review is in fact quite robust.” There is thus no support for the argument that the Court’s theory of discretion will affect the judiciary’s legitimacy.

B. The Questions To Be Asked

This Article has demonstrated that the proper scope of judicial decisionmaking cannot be decided by reference to criteria such as majoritarianism, determinacy, judicial tyranny, or legitimacy. The next step is to determine the right questions. What is the proper ground for debate in deciding the appropriate theory of judicial discretion?

I identify three questions that can be debated, the answers to

307. See supra text accompanying notes 205-07.

The possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years; they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court’s power continued to grow and probably never has been greater than it has been over the past two decades.

J. Ely, supra note 7, at 47-48.

310. One could argue that the Court’s legitimacy depends on an appearance of objectivity. See, e.g., Grano, supra note 5, at 20; Levinson, Taking Law Seriously: Reflections on “Thinking Like a Lawyer” (Book Review), 50 STAN. L. REV. 1071, 1106-07 (1978). But all constitutional review is subjective. Literalism is subjective because the Constitution’s provisions are open-ended. See supra text accompanying notes 209-20. Originalism is subjective because history is inherently unclear and subject to interpretation. See M. Perry, supra note 8, at 69 (noting that “historical inquiry is inherently subjective: to some extent our vision of the past is irremediably colored by our vision of the present”); see also supra text accompanying notes 221-36. Conceptualism is subjective because the choice of level of generality is purely discretionary. See supra text accompanying notes 241-53. The cultural values theory is subjective because there is no determinate, objective set of social values. See supra text accompanying notes 256-63. Finally, the process model is subjective because there obviously is no objective definition of a fair process. See supra subpart II(B)(2). In short, as Professor Arthur S. Miller pointed out, “[T]here is no escape from the proposition that judges are entrusted with immense discretion.” Miller, supra note 40, at 331. Because all judicial review is subjective, it is pointless to criticize any particular theory for being subjective.

311. Interestingly, no one has argued about whether there should be a Constitution to protect certain values from majority rule. Nor has anyone argued about whether constitutional judicial review should exist at all. Although both of these issues are recognized as subject to discussion, they are accepted as axioms in the debate over judicial review and thus receive little attention.

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which aid in determining the proper model for judicial review. The first question is whether the interpretation of constitutional provisions should be limited to the meaning at the time the Constitution was adopted or whether the meaning should change and evolve. Those who support literalism and originalism argue that the only relevant question is what the provision meant at the time of ratification. By contrast, those who argue for other theories of judicial discretion claim that the meaning of constitutional provisions should be influenced by contemporary needs and circumstances. One potential issue, then, is whether society is better served by a static or an evolving Constitution.

Those who argue for a static Constitution have claimed that permitting the Court to change the meaning of constitutional provisions either would be undemocratic or would cause indeterminacy, risk judicial tyranny, or jeopardize the legitimacy of the Court. For the reasons already detailed, none of these criteria is useful in deciding whether constitutional interpretation should be confined to ascertaining the original intent. Those who argue that the meaning of the Constitution should remain static must develop a political theory explaining their particular vision of the role of the Constitution in society. Similarly, those who reject literalism and originalism must produce a theory about the Constitution’s proper function and purpose. The discussion must focus on considerations such as the relative merits of stability and change, the desirability of a Constitution that adapts by evolution instead of by amendment, and the extent to which the Constitution should govern conduct.

While it certainly is possible to argue about whether society is better off with a static Constitution or with an evolving one, it is unlikely that significant debate will center on this question. Early in America’s constitutional history, Chief Justice John Marshall observed that a Constitution is “intended to endure for ages to come, to be adapted to the various crises of human affairs.” Dean Sandalow explains that “the capacity of constitutional law to adapt to changing circumstances and ideals is now so generally accepted that it has become a part of the

312. See supra text accompanying notes 175-81.
313. See, e.g., Bennett, supra note 50, at 1094 (stating that “it is the expectations of each succeeding generation, interacting with evolving notions of public policy, that matter”); Munzer & Nickle, supra note 179, at 1029 (“The Constitution has remained vital largely because its provisions have been adaptable to the changing needs of a developing society.”); Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1185 (1977) (claiming that the Court must “define and justify the process by which societal norms should be constructed for the purpose of giving content to constitutional law”).
314. See, e.g., R. Berger, supra note 4; Bork, supra note 4; Rehnquist, supra note 4.
Conventional wisdom of lawyers and informed segments of the la-

uity. If this "conventional wisdom" is accepted, then literalism and originalism must be rejected, because neither permits the Constitution's meaning to be adapted to modern circumstances. Scholars and judges still can argue about whether the Constitution's meaning should change or remain the same, but their arguments must be based on political theories yet to be developed.

The second question is: if the meaning of the Constitution should evolve, which particular institution(s) in society should have responsibility for this process? There are several conceivable answers to this question. One could argue that the three branches of the federal government should have equal authority to interpret the Constitution. Alternatively, one could argue that each branch of the government should have exclusive jurisdiction over certain parts of the Constitution, for which its interpretation would be final (absent a constitutional amendment). This approach would raise the subsidiary question of who decides when each branch can exercise this power and how such decisions should be made. Finally, one could argue that one branch should be vested with the power of binding constitutional interpretation under all circumstances for all provisions.

Again, the question of which institution(s) in society should determine the meaning of the Constitution cannot be answered on the basis of traditional arguments about majoritarianism, determinacy, judicial tyranny, or legitimacy. Instead, the discussion must focus on the purposes of the Constitution and the institutional arrangement most likely to accomplish those purposes.

317. See, e.g., Letter from Thomas Jefferson to Abigail Adams (September 11, 1804), in 8 The Writings of Thomas Jefferson 310 (Ford ed. 1897), reprinted in G. Gunther, Cases and Materials on Constitutional Law 26 (10th ed. 1980) (arguing that each branch has an equal right to determine the meaning of constitutional provisions); Veto Message of Andrew Jackson (July 10, 1832), in 2 Messages and Papers of the Presidents 576, 581, 583 (Richardson ed. 1896), reprinted in G. Gunther, supra, at 27 ("It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution . . . as it is of the supreme judges . . . ").
318. For example, when the Supreme Court declares that a case presents a political question, it is in essence declaring that the question of constitutionality is for other branches of government to decide. See, e.g., J. Choper, supra note 2, at 265 (determining a matter to be a political question leaves its "final resolution to the interplay of the national political processes"); cf. Baker v. Carr, 369 U.S. 186, 217 (1961) (defining the situations under which a political question exists); Henkin, Is There a Political Question Doctrine?, 85 YALE L.J. 597, 606 (1976) (political question doctrine as abdication to other branches of government).
320. There is much discussion about which branch of government should interpret the Consti-
Few would disagree that the Supreme Court should engage in at least some constitutional review. Regardless of whether the Framers intended it, constitutional judicial review is an accepted part of American government. Although its desirability can be questioned, the existence of judicial review probably will not provoke much controversy. Even those who believe that each branch of government should engage in constitutional interpretation probably will agree that the Court should serve as the ultimate arbiter of the meaning of most constitutional provisions. While many disagree about how the Court should do this, few will criticize the institution of judicial review. Nonetheless, the question of institutional competence remains an area of potential disagreement and debate.

Assuming that the meaning of the Constitution should evolve, the final question for debate—the question provoking the most disagreement—is which theory of constitutional interpretation should be used. Because the Constitution exists to protect certain values from majority rule, the best theory of constitutional interpretation is the one that best protects those values. To decide which theory of judicial discretion is preferable, it is necessary to answer two questions: which values are worthy of constitutional protection against majority rule, and which theory will best protect these values?

Inevitably, attempts to answer these questions raise still more questions concerning how the Court should choose these values. This is perhaps the most important subject for constitutional scholars to debate. Some authorities suggest that the Court should look to deeply embedded cultural values, others suggest that the Court look to natural law, and still others point to a "moral reality." Perhaps the best starting place in deciding how to identify values is to return to the discussions about judicial review and democratic theory and ask a basic question: Why is democracy a desirable system of government?

321. See, e.g., A. BICKEL, supra note 27, at 25 ("Courts have certain capacities for dealing with matters of principles that legislators and executives do not possess."); Dworkin, supra note 1, at 517 ("Judicial review assures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply as issues of political power, a transformation that cannot succeed, in any case not fully, in the legislature itself."); Wellington, supra note 164, at 493.

322. See, e.g., G. WHITE, supra note 189, at 160. Dean Wellington is one of the most prominent advocates of this approach. E.g., Wellington, supra note 186, at 284. In a recent book, Professor Bobbitt advances another approach to judicial review based on cultural values, which he terms "ethical argument." See P. BOBBITT, CONSTITUTIONAL FATE 94-97, 144-45, 159-67 (1982).

323. For a discussion of natural law approaches to constitutional values, see the discussion in J. ELY, supra note 7, at 48-54. The judicial decision considered to adopt most clearly a natural law approach is Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

323. Moore, Moral Reality, 1982 Wis. L. Rev. 1061 (defining and defending the notion of a moral reality—that there are correct answers to questions of value).
While a full answer to this question is complex and beyond the scope of this discussion, the question is of fundamental importance to the debate about judicial review.

First, any attempt to justify democracy relies on core values that also provide the starting point in designing a system of judicial review. For example, Henry Mayo's classic work *An Introduction to Democratic Theory* identifies a number of reasons why democracy is desirable. Mayo notes the ability of democracy to resolve disputes peacefully and to promote the noncoercive exercise of government authority, its ability to preserve individual autonomy and liberty, and its ability to maximize equality and justice. Many other scholars have defended democracy in similar terms. These values would be almost universally accepted in American society. Therefore, the best framework for judicial review is the one that most fully protects these values. For example, democracy avoids coercive government, in part, by holding regular elections in which all can participate. Thus, a relevant question in the debate over judicial review asks which model of court discretion can best ensure open and fair elections. Arguments over specific examples will serve to identify those values that should be protected from majority rule and to permit generalizations about which approach to judicial review will maximize protection.

Second, considering why democracy is preferred makes clear that democracy is not an end in itself, but a means to other goals. One of the principal fallacies in the current debate over judicial review is that majority rule is viewed as an intrinsic rather than as an instrumental value. As such, it has been given precedence over all other values, and judicial review has been viewed as a means which must be reconciled with the ultimate end of electorally accountable decisionmak-
ing.331 But if democracy is viewed instrumentally, as a means to other ends, the appropriate question is what form of judicial review most enhances those objectives—the true ends to be served.

Third, inquiring about the purpose of democracy illuminates the error of defining democracy in purely procedural terms. Any definition of democracy must include substantive values such as personal liberty and equality for minorities. Because majority rule is not favored over these substantive ends, judicial review should be evaluated, not in terms of its compatibility with majority rule, but in regard to whether it can further these substantive values. Judicial review may be antimajoritarian, but it is not a deviant institution.332 To the contrary, it is an excellent means for protecting precisely the values that democracy is designed to further.

Certainly, there will be disagreement over the values that should be protected by the Constitution and over the theory that best protects these values, but these questions are precisely what the debate over judicial review should be about. It is impossible to choose a theory of judicial discretion without first deciding what that theory is supposed to accomplish. This inevitably entails a debate over the values that society should deem worthy of constitutional protection—a debate of enormous significance. Thus far, constitutional scholars have tried to avoid these questions by arguing over procedural issues like majoritarianism and determinacy that cannot hope to guide the selection of a theory of judicial review. When the misleading questions are brushed aside, it is clear that the only way to choose a theory of judicial discretion is by reference to the substantive values that the Constitution is supposed to protect.

V. Conclusion

It is hard to imagine a more damning criticism of a practice in our society than the accusation of being antidemocratic. The charge itself creates a psychological presumption against the practice. The interpretivist attack on judicial activism employs this attack by claiming that all

331. See, e.g., J. Ely, supra note 7, at 7-8 (defining the task of reconciling judicial review with majority rule); M. Perry, supra note 8, at 125 (same).
332. See A. Bickel, supra note 27, at 18 (labeling judicial review a “deviant institution in American government”); see also H. Commager, Majority Rule and Minority Rights 56 (1943) (describing judicial review as a “drag . . . upon democracy”), R. Neely, How Courts Govern America 8 (1981) (tension between democracy and judicial review). But judicial review is only “deviant” or a “drag upon democracy” if majority rule is given disproportionate weight in defining the character of American democracy. If protecting minorities and crucial values from social majorities is given weight in defining democracy, judicial review is an integral part of democracy and not at all deviant.

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noninterpretive review is antidemocratic and invalid. Defenders of judicial activism unfortunately fell for this ploy and have devoted their efforts to the impossible task of reconciling judicial review with majority rule. The price of focusing on this unanswerable question could be the loss of legitimacy of those judicial decisions that advance individual liberty and social equality.

The debate over judicial review must be shifted to fairer grounds. First, it must acknowledge that all judicial review is antimajoritarian and that it is useless and dishonest to criticize noninterpretive review as being uniquely antidemocratic. A purely procedural definition of democracy is not what the Constitution embodies. Second, it is necessary to identify the real question for debate: what is the proper scope of judicial discretion in interpreting the Constitution? Third, the labels “interpretivism” and “noninterpretivism” should not be used to obscure the debate. Each term connotes a range of different theories that should be analyzed separately. Fourth, acceptable criteria are needed to evaluate theories of judicial discretion, replacing criteria based on a desire for determinacy, a fear of judicial tyranny, or the need to preserve judicial legitimacy.

Ultimately, the debate about the proper scope of judicial discretion must focus on the purposes the Constitution should serve in society and the values the Constitution should protect. There probably is no more important or enlightening question than asking what we as a nation care most deeply about. Academic literature can play an essential role by advocating and discussing the importance of various interests. In fact, much of the literature about judicial review is valuable, not because of its discussion of democratic theory, but because of its exploration of values that the Court should protect. Jesse Choper demonstrates that the Court's highest mission is protecting individual liberties. John Hart Ely establishes that participational values must be safeguarded by the Court in a democratic society. Michael Perry demonstrates that the Court must act to protect institutionalized persons who are usually ignored by the political processes.

The question asked determines the answer received. In the debate over judicial review, too much attention has been focused on the answers and not nearly enough on the questions.

333. J. Choper, supra note 2, at 60-128.
334. J. Ely, supra note 7, at 73-180.
335. M. Perry, supra note 8, at 146-62.