WRONG QUESTIONS GET WRONG ANSWERS: AN ANALYSIS OF PROFESSOR CARTER’S APPROACH TO JUDICIAL REVIEW†

ERWIN CHEMERINSKY*

Hardly a year goes by without some learned professor announcing that he has discovered the final solution to the counter-majoritarian difficulty, or even more darkly, that the counter-majoritarian difficulty is unsolvable.

—Bruce Ackerman

The debate over the legitimacy of judicial review continues. The newest entry into the field is an article by Professor Stephen Carter presenting his explanation for how judicial review can be reconciled with majority rule. Professor Carter explicitly disavows any attempt at creating a grand theory justifying all forms of judicial activism. Rather, he attempts to defend what he terms a “muddle”—a system of interpretation which explains how government actually functions and which uses separate approaches to interpret different parts of the Constitution.

Professor Carter does an excellent job of presenting the traditional criticism of judicial review: Judicial decisionmaking is inconsistent with the assumption that value choices in a democracy should be made by electorate

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* Associate Professor, University of Southern California Law Center. I want to thank Larry Simon and Marcy Strauss for their very helpful comments on an earlier draft of this article.


3 Id. at 823. Professor Carter criticizes what he terms the “perfectionist” theories which attempt to explain the legitimacy of all constitutional law. Id. at 831-47, 866-67. Although Professor Carter describes modest objectives for the article and denies that he is presenting a theory of judicial review, he does provide a view as to how the judiciary should decide constitutional cases. For example, he defends the use of originalism for cases involving the structure of government. Id. at 861.

4 Professor Carter’s title labels the current system a “muddle” and in many places he uses that term to describe the system he is defending. See, e.g., id. at 848, 857, 871.
accountable bodies. As he explains, conservative critics use this argument to question the legitimacy of judicial decisions protecting rights not explicitly stated in the Constitution or intended by the document's framers. Furthermore, critics from the left argue that judicial review inevitably requires judges to decide cases based on their personal values, a reality which they argue makes judicial review inconsistent with the premises of a liberal democracy.

Professor Carter accepts the validity of these criticisms and agrees that it is necessary to construct a theory of judicial review that enables judges to decide cases without imposing their own values. He examines many of the major theories which have been advanced and carefully explains how none are capable of answering the critics from either the right or the left. Thus, he concludes that if judicial review is to be saved another explanation for its legitimacy, another answer to the critics, must be offered. Professor Carter then proceeds to explain his approach to constitutional interpretation.

This essay examines Professor Carter's attempt to solve the problem he describes. I contend that Professor Carter's solution fails. It is based on logical fallacies and false premises, and does not begin to explain how judges can make decisions without imposing values. Even worse, his theory un-

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5 See id. at 821-31. The tension between judicial review and majority rule is what Alexander Bickel referred to as the counter-majoritarian difficulty. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-18 (1962) ("[W]hen the Supreme Court declares unconstitutional a legislative act or 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.").


7 Professor Carter carefully summarizes the critique of those whom he terms "delegitimizers"—critics from the left who argue that liberal democracy requires adjudication without regard to the values of the interpreters. Carter, supra note 2, at 823-31. Professor Tushnet's work is identified by Professor Carter as the "most prolific exemplar" of this critique. Id. at 824 & n.8 (citing Tushnet, Critical Legal Studies and Constitutional Law: An Essay in Deconstruction, 36 STAN. L. REV. 623 (1984); Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781 (1983); Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037 (1980) [hereinafter cited as Tushnet, Darkness]). Professor Carter states that "much" of his article "may consequently be understood as a reaction . . . to Professor Tushnet's work." Carter, supra note 2, at 824 n.8.

8 See, e.g., Carter, supra note 2, at 824-28, 861, 862 (describing the desirability of "value-free" adjudication).

9 I think that the strength of Professor Carter's article is his brief review of the attempts by other commentators to develop a theory which reconciles judicial review with majority rule. See id. at 831-40. Professor Carter ably demonstrates that none of these scholars succeed in defining a method of judicial review which avoids judicial value imposition.
dermines the legitimacy of judicial review by making it trivial and unnecessary. Section I of this reply describes Professor Carter’s defense of judicial review. Section II critiques his defense and presents its inadequacies and failings.

Finally, in Section III, I argue that Professor Carter’s failure to describe a system of judicial review in which judges do not make value judgments is a result of his setting out on an impossible task. Constitutional judicial review, by an unelected Supreme Court, is intentionally antimagoritarian and it is logically impossible to make such review consistent with a definition of democracy as simple as majority rule. Furthermore, the impossibility of formalism and the inherent ambiguities in the Constitution ensure that judges must make value judgments. But contrary to Professor Carter, I do not believe that this reality undermines the legitimacy of judicial review. Rather what is necessary is a theory which explains why it is desirable to have an institution, like the judiciary, identifying and protecting important values from the majority of society.  

I. Professor Carter’s Justification for Judicial Review

Professor Carter’s defense of judicial review distinguishes the process of constitutional interpretation in cases involving fundamental rights from interpretation in cases concerning the structure of the government. Decisions involving fundamental rights, he argues, pose little cause for concern because the results ultimately would have been produced by the political process even without judicial review. He states that “[t]he fundamental rights cases arguably reflect little governance. Some things may happen a little sooner or a little later than they would otherwise happen, but changes of that sort represent less governance that fine-tuning.”  

He concludes that because the ultimate resolution of matters of fundamental rights must be through the political process, which has to enforce judicial decisions, there should be little concern for how the Court comes to its conclusions. Professor Carter writes of key Court decisions involving fundamental

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10 My argument that the current debate over the legitimacy of judicial review begins with the wrong question is developed in Chemerinsky, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, 62 Tex. L. Rev. 1207 (1984). I am currently completing a book-length essay, tentatively titled “Interpreting the Constitution,” in which I attempt to defend the view that it is desirable for the Constitution to evolve by open-ended judicial interpretation.

11 Carter, supra note 2, at 851.

12 Professor Carter does not explicitly say that there is no need for a theory of interpretation for fundamental rights cases. However, although he advocates originalism for interpreting the political Constitution, he says nothing about the proper methodology for fundamental rights cases. This silence seems to reflect his conclusion that “we as a nation are not really governed by the Supreme Court’s fundamental rights cases.” Id. at 851.
rights\textsuperscript{13} that "[o]bviously, in each case American history would have been different—perhaps briefly—had the decision gone the other way, but it is difficult to resist the conclusion that the ultimate resolution of each controversy was or will be the result of public dialogue and political decision."\textsuperscript{14}

Professor Carter makes a different argument concerning issues relating to the structure of government; what he terms the "political Constitution."
\textsuperscript{15} He argues that often the Constitution is clear about how the government should operate. The Constitution specifies many of the requisites of the government's structure; the terms of office for federal elected officials, the size of the Houses of Congress, the manner for enacting laws, and so on. Professor Carter concludes that because the Constitution is clear as to the manner in which government should be structured and operated, the Court should follow an originalist approach in deciding cases related to the political Constitution.\textsuperscript{16} "Originalism" refers to a method of deciding cases based solely on the stated or intended meaning of constitutional provisions.\textsuperscript{17}

Professor Carter further argues that an originalist approach to interpretation of the political Constitution would allow the Court to escape from the criticism that the Justices were imposing their own values. Professor Carter writes "if judicial decisions aim self-consciously at keeping the structure of government closer to the Framers' conception, then with respect to the political Constitution, at least, the courts will be able to claim a relatively value free rule of interpretation."\textsuperscript{18} According to Professor Carter, originalism is desirable because it allows "adjudication under the political Constitution [to] be guided by rules of construction that will permit—or require—interpretations that are relatively value free."\textsuperscript{19}


\textsuperscript{14} Carter, supra note 2, at 851.

\textsuperscript{15} Id. at 853 passim.

\textsuperscript{16} Id. at 861 ("Using originalism as a strategy for understanding the political Constitution makes sense for number of reasons.").

\textsuperscript{17} Professor Paul Brest defines originalism as a theory that "accords binding authority to the text of the Constitution or the intention of its adopters." Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 204 (1980). "Originalism" often is used synonymously with the term "interpretivism." Interpretivism refers to the belief that the Court must confine itself to norms clearly stated or implied in the language of the Constitution. J. Ely, Democracy and Distrust 1 (1980). The term originalism is used by Professor Carter and therefore it is used throughout this essay.

\textsuperscript{18} Carter, supra note 2, at 861.

\textsuperscript{19} Id. at 862.
II. PROFESSOR CARTER’S ANSWER FAILS

In this section I argue that Professor Carter’s approach to judicial review is based on logical fallacies, false premises, and the absence of an adequate theory of interpretation. Furthermore, his approach not only fails to solve the problems he identifies, but also undermines the legitimacy of judicial review.

A. The Fallacy of Composition

It is a logical fallacy to conclude that because some members of a group are of a certain type, all members are therefore of that type. This error is referred to as the fallacy of composition. Professor Carter’s justification for judicial review repeatedly makes this mistake.

Initially, Professor Carter defends judicial review in fundamental rights cases by arguing that the Supreme Court is often doing no more than “fine-tuning.” From this observation he concludes that judicial review in fundamental rights cases never poses a conflict with majority rule. The conclusion does not follow from the premise—that decisions are sometimes just “fine-tuning” does not prove that they are always “fine-tuning.” Yet, Professor Carter concludes, “none of the Court’s fundamental rights decisions has worked a societal change so fundamental and revolutionary that it could not in fairly short order have been brought about by other means.”

To support this conclusion, Professor Carter would need to demonstrate one of two things. Either he could prove the Supreme Court always reaches the results the political process would or he could argue that decisions are illegitimate when the Court reaches results different from the political process. Professor Carter demonstrates neither. The former is not only unproven, but also is untrue—it is difficult to believe that the political process would have desegregated the South or eliminated school prayer without judicial action. The latter approach, arguing that judicial review is illegitimate if its results differ from those which would be produced by the political process, is a normative argument that requires explanation and defense. None is provided. In fact, such a normative theory makes judicial review completely unnecessary because under such a theory everything that the Court does legitimately would happen even without judicial action.

Professor Carter begins discussing his “rule for interpretation” of the political Constitution by pointing out that “the great majority” of federal

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20 *Id.* at 850. Professor Carter uses the term “could” in this passage. If he is simply saying that the elected branches of government have the political authority to mandate the same results as the courts, I agree. That they have the ability to act, of course, does not prove that they are likely to act; in order to prove that the Court is only fine tuning and not governing, Professor Carter must be assuming that the political branches not only could act, but that they likely would implement the same results even without court decisions.

21 See infra notes 32-38.
government actions occur without judicial intervention. While this is certainly true, it says nothing about the importance of judicial review in cases where the courts do become involved or indicate anything about the proper method of constitutional interpretation in such cases.

Professor Carter continues his argument concerning the political Constitution by stating that constitutional provisions concerning the structure of government usually are clear and specific. From this he concludes that originalism is appropriate for the political Constitution, stating that "with respect to these structural clauses, neither the moral problem of repugnant result nor the hermeneutical problem of unknowable history should prove insurmountable." In other words, because some parts of the political Constitution are clear, in all instances originalism is appropriate.

The fallacy of composition is especially troubling here because Professor Carter infers from cases where judicial review is least important, where the Constitution is clear and judicial review is unlikely and least likely to be controversial, to come to conclusions about cases where review is most frequent and crucial. The simple cases are of little help where the Constitution is ambiguous and important public policies depend on the judiciary's decision. For example, the fact that the Constitution is specific about the fact that the President must be 35 years old is of no help in deciding whether the President could rescind the Taiwan treaty without Senate consent or whether the Vietnam War was unconstitutional. Because of this fallacy of

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22 Carter, supra note 2, at 855. Professor Carter certainly makes an important point by explaining that the Court's role must be understood in the context of the entire operation of American government. My criticism is that he uses this description as a basis for normative analysis without adequately explaining why the places where the Constitution is clear say anything about how to interpret the Constitution where it is unclear.

23 Id. at 853. Professor Carter explicitly states that he "suggest[s] using the more determinate provisions to justify the process of interpreting the less determinate ones." Such an approach requires defense of why one set of provisions is at all relevant in interpreting another, very different, set of constitutional provisions. No such defense is offered.

24 Id. at 861.

25 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, supra note 7, at 1042.


27 The issue of the President's authority to wage war without an official congressional declaration of war is raised in challenges to the constitutionality of the Vietnam War. See, e.g., A. D'AMATO & R. O'NEILL, THE JUDICIARY AND VIETNAM (1972); Henkin, Vietnam in the Courts of the United States, 63 AM. J. INT'L L. 284 (1969). Many lawsuits were filed challenging the constitutionality of the Vietnam War. In most instances the courts refused to reach the merits, holding that the issue was a nonjusticiable political question. See, e.g., Holtzman v. Schlesinger, 484 F.2d
composition, Professor Carter's argument is based on a generalization that is undefended and illogical.

B. False Premises Yield False Answers

Each part of Professor Carter's approach is based on a key assumption. His approach to interpretation in fundamental rights cases is based on the premise that the Court's decisions represent "fine-tuning," producing results that the political process would also have reached. 28 His argument for an originalist methodology in interpreting the political Constitution assumes that such an approach poses neither normative nor hermeneutical difficulties. 29 This section argues that these premises are false and therefore all of the conclusions based on them are also untrue.

Professor Carter makes an empirical claim that the political process could have produced the same results concerning fundamental rights even without judicial action. 30 At the very least, Professor Carter does not prove this premise. Moreover, the premise is simply untrue; in numerous instances the Court did work a "revolutionary change" that could not "in short order" have been attained by the political process. 31


28 Carter, supra note 2, at 850-52.
29 Id. at 861.
30 The problem, of course, is that it is an empirical claim that can't be proven because it is impossible to know what would have happened had the Court not acted. The closest one can come to an empirical argument is to identify certain Supreme Court decisions in which the Court declined to take action and to see if the political process produced the result that the Court declined to impose. For example, in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court refused to declare unconstitutional a system of funding public schools primarily through local property taxes. The political process has not changed the practice and gross funding disparities remain among school districts. See, e.g., Chemerinsky, Ending the Dual System of American Public Education: The Urgent Need for Legislative Action, 32 De Paul L. Rev. 77 (1982). If anything, such examples prove that the Court can do things that the political process is unable to accomplish. The problem with such proof is that the same forces might keep both the legislature and the judiciary from acting and therefore the example doesn't help determine whether the judiciary is just fine tuning in cases where it does give relief. At the very least, when the Court invalidates a law enacted by the political process, it seems impossible to argue that the political and judicial processes would come to the same result. The political process left alone would have the statute; the action of the judicial process means that the statute is invalidated.
31 Empirical evidence demonstrates that Supreme Court decisions in controversial areas such as school desegregation and abortion have had a substantial effect in
The Supreme Court's role in the desegregation of the South in the 1950's and 1960's is a prominent example. In light of the South's strong resistance to desegregation, it is impossible to believe that Southern state legislatures would have voluntarily desegregated their schools or public facilities. Almost every Southern State enacted laws ordering disobedience to the Supreme Court's desegregation decisions. 32

Nor is it likely that Congress would have enacted legislation compelling desegregation. Southern Senators and Representatives had disproportionate influence during this time period. In large part, this reflected the importance of the seniority system in Congress. During the 1950's and 1960's virtually every congressional committee was chaired by a Southerner. 33 Southerners were in a position to block civil rights legislation given their influence in Congress and congressional procedures which gave great power to committee chairs. There can be no doubt that they would have used all of their influence to thwart proposed federal legislation ordering desegregation. In 1956, ninety-six Southern Congressmen issued a declaration denouncing the Supreme Court's decision in Brown v. Board of Education 34 as a violation of the Constitution and calling on their states to "resist forced integration by any unlawful means." 35


33 See, e.g., J. Bass, supra note 32, at 148:

The political realities [facing the Kennedy Administration in acting on civil rights] was having to deal with Congress at a time when the seniority system was at its peak and dominated by Southern Democrats committed to the defense of segregation, either because of their conviction or their perception of political reality at home.

The passage of the 1964 Civil Rights Act might be taken as proof to the contrary, that Congress was likely to adopt civil rights laws notwithstanding opposition from the South. However, for many reasons, the enactment of this law should not be read as an indication that the Court in Brown was just "fine tuning." First, the passage of the Civil Rights Act, in large part, reflects an aggressive campaign by President Lyndon Johnson to persuade Congress to enact the law as a memorial to recently assassinated President John Kennedy. R. Kluger, Simple Justice 758 (1975). Second, the enactment of the Civil Rights Act reflected a change in social attitudes that occurred, in part, because of the Supreme Court's decision in Brown. Id. Finally, the Civil Rights Act eliminated discrimination especially in public accommodations and employment. Although desegregation in these areas was controversial, the opposition was not nearly as intense or as sustained as desegregation of schools.


35 N.Y. Times, March 12, 1956, at 19, col. 2 (the "Southern Declaration of Integration").
In light of history, it seems wrong to label the Court's desegregation decisions as "fine-tuning that would have resulted from the political process even without judicial intervention." Of course, it is possible to argue that society's attitudes were changing and perhaps in twenty or thirty years the political process would have ordered desegregation. But this does not establish that the Court is only fine-tuning.

The desegregation decisions are not unique. Is it really plausible to argue that legislatures, either federal or state, would have prohibited voluntary school prayer?\(^{36}\) Or to argue that legislatures would have enacted laws protecting the rights of criminal suspects by creating the exclusionary rule or requiring Miranda warnings?\(^{37}\) Likewise, in the area of abortion rights, the powerful lobbying of a minority created great legislative "rigidity" and made it highly unlikely that most legislatures would have legalized abortion without judicial intervention.\(^{38}\) The repeated attempts by legislatures at all levels to circumvent Roe v. Wade\(^ {39}\) indicate their continued hostility and unwillingness to protect this right except as they are ordered to do so by the courts.

Professor Carter cannot reply to these examples by dismissing them as atypical cases because they were highly controversial. The intense public concern over these cases reflects the fact that they involve matters about which people care a great deal. The judicial role and the method of constitutional interpretation is especially important for these cases. These examples again reveal why the fallacy of composition is critical. It is improper to generalize from uncontroversial cases and come to a conclusion about all cases.

In fact, any time the Court invalidates a law enacted by Congress a totally different result is produced from that which would exist without judicial review. Absent judicial action, the existing statute would remain the law. By invalidating the statute, the Court is doing more than just fine-tuning; it is causing a result exactly opposite to what would exist without judicial review.

Professor Carter's premises regarding the political Constitution also lead to false answers. He states that the provisions of the Constitution dealing

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\(^{38}\) Professor Tribe observes that the intensity and political power of supporters of restrictive abortion laws created "unusual legislative rigidity" and made reforms unlikely. L. Tribe, American Constitutional Law 929 (1978). In part, too, because abortion was available to the relatively wealthy who could travel to jurisdictions where it was legal, there was much less pressure for repeal of restrictive laws. Id. at 930. Abortion was illegal in 46 states when Roe v. Wade was decided. 410 U.S. 113, 140 (1973).

\(^{39}\) 410 U.S. 113 (1973).
with the structure of government usually are clear and that an originalist approach to these provisions would pose neither normative nor interpretive problems. Professor Carter also says that originalism is rejected for interpretation in fundamental rights cases because it would lead to results that he regards as "repugnant." 40 If repugnant results in fundamental rights cases justify rejection of originalism, then originalism also must be discarded for the political Constitution. Article II of the Constitution provides a simple example. Article II refers to the President as "he." 41 The Framers intended that the President would be male and, in fact, excluded women from all political participation. 42 Thus, an originalist would be obligated to declare unconstitutional the election of a woman as President or Vice President. This seems a paradigm example of what Professor Carter terms "the moral problem of the repugnant result."

Professor Carter is also incorrect when he asserts that the political Constitution poses no interpretive problems. In countless areas concerning the structure of government, the Constitution is silent or ambiguous. As one example, when may the President exercise inherent authority, acting without express constitutional or statutory authority? This question is critical in deciding whether the President can recognize foreign governments, 43 remove Cabinet officials, 44 rescind treaties, 45 impound funds, 46 assert execu-

40 Carter, supra note 2, at 859 (noting that if originalism is employed to resolve disputes in the fundamental rights area "the results obtained will, from a self-conscious natural law perspective, seem morally repugnant").


42 Saphire, supra note 41, at 796-97 (the Framers "would have understood Article II to exclude women from presidential eligibility"). Thomas Jefferson is quoted as saying that, "were our state a pure democracy, there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men." L. Tribe, supra note 38, at 1060 n.2 (quoting M. GRUBBERG, WOMEN IN AMERICAN POLITICS 4 (1960)).

43 The Constitution is silent as to whether the President possess power to recognize foreign governments. See E. CORWIN, THE PRESIDENT: OFFICE AND POWERS 184-93 (4th ed. 1957) (discussing the fight over recognition power between Congress and the President); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 16 (1972) (the Constitution fails to delegate important powers with respect to foreign policy).


45 See, e.g., Goldwater v. Carter, 444 U.S. 996 (1979) (mem.) (President's authority to rescind treaty with Taiwan).

tive privilege, or even wage war. All of these examples involve basic aspects of American government and in each the courts confront a silent or ambiguous document. Similarly, with regard to the legislative power, the Constitution does not describe when Congress can delegate power or whether such delegations can be subject to the legislative veto. And, perhaps most importantly, the very existence of judicial review cannot be justified from an originalist perspective. If an originalist believes that the Supreme Court may only act when the Constitution is clear, then the Court may never engage in judicial review.

In fact, originalism poses an even more basic hermeneutical problem, since it cannot be known whether the Framers intended for originalist premises to guide constitutional interpretation. Originalism requires that the Constitution be interpreted in accord with the Framers' intent. Thus, if the Framers intended that subsequent generations use a model other than originalism, the originalists' premise forces them to abandon their theory.


48 See supra note 27 (authorities discussing presidential authority to wage war without an official congressional declaraion).


Professor Carter defends the Court's formalistic opinion in Chadha, which looks solely to the language of the Constitution and the Framers' intent in invalidating the legislative veto. Carter, supra note 2, at 864. Professor Carter's defense doesn't answer the argument that a non-originalist approach to the legislative veto is appropriate because it resolves the non-originalist problem of delegation of legislative power. See, e.g., Tribe, The Legislative Veto Decision: A Law by any Other Name?, 21 Harv. J. Legis. 1 (1984); Spann, Deconstructing the Legislative Veto, 68 Minn. L. Rev. 473 (1984).

50 See Bork, supra note 6, at 8 (where the constitutional materials are unclear there is no basis for judicial action).

51 See Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1090 (1981) ("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.").

In a recent article, Professor H. Jefferson Powell argues that the Framers did not intend for their intent to guide future constitutional decisionmaking. Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 886, 948 (1985).
Because the theory of interpretation intended by the Framers is unknown, originalism cannot be justified even for the political Constitution.

The point is a simple one: Professor Carter begins with premises that are not justified and when examined turn out to be false. Fundamental rights decisions are often more than fine-tuning; often they effect major changes in society. Originalism is not easily followed in interpreting the political Constitution; there are normative and interpretive problems with practicing originalism in this area which are identical to the problems in applying originalism in fundamental rights cases.

C. The Absence of a Theory of Interpretation

Professor Carter describes his task as "justifying" judicial review. Even if Professor Carter's premises are taken as true, however, his conclusions do not follow from them. Professor Carter does not provide a justification for the claim that a theory of interpretation is unnecessary for fundamental rights cases or the claim that originalism is best for the political Constitution.

Even if the Court's decisions in the area of fundamental rights could be considered just "fine-tuning," this observation says nothing about how the Court should go about fine-tuning. What theory of interpretation should the Court use in fundamental rights cases? Should the Court follow the literal language of the Constitution; the Framers' intent; the Framers' concepts, but not their conceptions; social traditions; consensus; John Hart Ely's process theory? Professor Carter offers no suggestions.

Ultimately, Professor Carter must be saying that because the political process would have come to the same result anyway the Court's choice of methodology in fundamental rights cases is unimportant. But the fact that the political process would have come to the same result does not establish the conclusion that the cases are unimportant or that a theory of interpretation unnecessary. The cases might be important as catalysts for political action, as reinforcement for the political branches, or as restraints on the political process. In short, even if Professor Carter is correct that the Court

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32 Various approaches to judicial review are described in Chemerinsky, supra note 10, at 1234-36.

33 For example, in the area of civil rights, the Supreme Court's decisions, and the attitude changes which resulted, were partially responsible for the enactment of civil rights laws. See, R. Kluger, supra note 33, at 758.

34 For example, Supreme Court decisions might reinforce decisions of the political process by upholding them, thus adding credibility to controversial legislative actions. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding New Deal legislation); United States v. Darby, 312 U.S. 100 (1941) (same); Wickard v. Filburn, 317 U.S. 111 (1942) (same). A tragic example of Supreme Court reinforcement of political decisions is Korematsu v. United States, 323 U.S. 214 (1944) (upholding the constitutionality of evacuation of Japanese Americans during World War II).

35 In virtually every instance where the Court declares a law unconstitutional it is
is just "fine-tuning," its decisions have tremendous instrumental importance in our system of government.

Professor Carter's arguments also fail to justify why originalism is appropriate for the political Constitution. His first argument is that "there may be no good reason not to try to discover the original understanding with respect to the provisions of our political Constitution." This obviously is not a defense for originalism. It is circular to argue 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.

Professor Carter then argues that originalism does not create repugnant results or pose hermeneutical problems in interpreting the political Constitution. Even if this argument were correct it still does not justify originalism. Reaching results that are acceptable and determinative does not explain why originalism should be used as opposed to other methods of interpretation that also produce acceptable results. Professor Carter still needs a theory justifying originalism.

Finally, Professor Carter argues that originalism is best because by "keeping the structure of government close to the Framers' conception, then with respect to the political Constitution, at least, the courts will be able to claim a relatively value free rule of interpretation." But originalism is hardly value free. At the very least, it is a choice to follow the Framers' values—values that were racist and sexist. Either these values must be followed or the values and originalism rejected. In either case, a value choice is made.

Moreover, the originalist interpretive process is never value free. Frequently there will be conflicts about the Framers' intent. The language of the Constitution and the records of the debates are often ambiguous. At the

restraining the political branches and coming to different results than the political branches would. For example, between 1887 and 1937, the Court invalidated state and federal laws protecting consumers and employees. See, e.g., Lochner v. New York, 198 U.S. 45 (1905) (state statute regulating labor unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (federal statute regulating child labor unconstitutional); Carter v. Carter Coal Co., 298 U.S. 238 (1936) (federal statute regulating coal industry unconstitutional).

56 Carter, supra note 2, at 867.

57 See Kay, Preconstitutional Rules, 42 Ohio St. L.J. 187, 193 n.22 ("[I]t 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.").

58 Carter, supra note 2, at 861.

59 Many scholars have demonstrated this indeterminacy by illustrating the ambiguity of the text and statements in the ratification debate and the difficulty of identifying group intent. See Dworkin, supra note 1, at 481; Saphire, supra note 41, at 777-78; Shaman, The Constitution, the Court, and Creativity, Hastings Const. L.Q. 257, 265 (1982); Wofford, The Blinding Light: The Uses of History in Constitutional Interpretation, 31 U. Chi. L. Rev. 502, 508-09 (1964). In fact, Professor Kenneth Arrow's famous Impossibility Theorem demonstrates that it is impossi-
very least, because conflicting positions were expressed at the Constitutional Convention and in the ratification debates, there is a major interpretive problem in deciding whose intent matters. Litigation develops precisely because there are conflicts in interpretation; when the Constitution is unambiguous it almost always is followed.

Furthermore, the process of applying the Framers' intent to modern circumstances requires inferences that can never be value free. Legal realists long ago demonstrated that formalism is impossible in deciding cases and the inevitable discretion ensures that values enter into the interpretive process. Social psychologists have also demonstrated that a person's interpretations are affected by his or her beliefs. Selective perception is inevitable and prevents any claim of value free interpretation.

D. The Approach Fails at its Own Objective

Professor Carter sets out to answer a particular set of critics. Specifically, he seeks to reply to those who argue that judicial review is illegitimate in a liberal democracy because it is improper for judges to decide cases based on their personal values. The critics argue that decisions in a democracy should be made by the majority and judicial review, being countermajoritarian, is illegitimate, especially when judges do not apply values stated or implied in the Constitution. Professor Carter does not argue that the critics are wrong in stating that judicial review is illegitimate if judges apply their personal values. Rather, he seeks to describe an approach where judges need not decide cases based on their own values. This section argues that Professor Carter fails to achieve this objective.

In the area of fundamental rights, Professor Carter argues that judges are not imposing their own values because the ultimate result in the cases was

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ble to construct a set of social preferences out of the preferences of the individual members of a group. See Arrow, A Difficulty in the Concept of Social Welfare, 58 J. POL. ECON. 328 (1950); see also A. Feldman, Welfare Economics and Social Choice Theory 178-95 (1980); cf. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802 (1982) (applying Arrow's Impossibility Theorem to Supreme Court decisionmaking).

Because formalism is impossible, discretion is inevitable in the application of laws. See H.L.A. Hart, The Concept of Law 124-25 (1961); H. Kelsen, The Pure Theory of Law 349 (1967) ("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.").

See e.g., G. Murphy, L. Murphy, & T. Newcomb, Experimental Social Psychology 215-21 (rev. ed. 1937). Historians argue that there is no such thing as value-free history; all history is an interpretation affected by the historian's view. See E. Carr, What is History? 16-24 (1961); R. Collingwood, The Idea of History 218-19 (1946).

Carter, supra note 2, at 823-31.
the result of public dialogue and political decision." He states "whether the controversy is obeyed, evaded, or overturned, the ultimate decision rests with all political actors, not merely with judicial ones." First, Professor Carter again has committed the fallacy of composition. The fact that the courts usually need assistance from the political branches to effectuate their decisions does not mean that such assistance is always necessary. In many instances, the courts can implement their own decisions. For example, in the area of criminal procedure, the judiciary devised and implemented the exclusionary rule. No action by the political branches is necessary in order for the judiciary to exclude evidence at criminal trials. Courts thus are able to articulate rules for searches and seizures or interrogations and enforce the rules by excluding evidence obtained in violation of the court-imposed standards. In these fundamental rights cases, judges imposed values not stated in the Constitution or intended by the Framers. No one maintains that the Framers' intended Miranda warnings be given to criminal suspects or had any intent with regard to electronic eavesdropping. This example illustrates that it is wrong to say that courts do not impose values in fundamental rights cases because their decisions depend on compliance by the political branches. In some instances, the judiciary can enforce its own rulings.

Second, the fact that the political branches must comply with the courts' decisions does not deny that judges may be imposing their personal values. For example, the Court ordered desegregation of public schools because the Justices believed that separate schools violated the equal protection clause. The President might have chosen to comply with this decision simply because he respected the authority of the Supreme Court.

The fifty years prior to 1937 provide another example. The Supreme Court during this period struck down progressive legislation enacted by state and federal legislatures to protect workers and consumers. These decisions

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63 Id. at 851.
64 Id. at 852.
65 See supra note 37.
66 The judiciary's power to hold in contempt those who disregard its orders gives the courts a tool to enforce a large portion of its decisions.
67 There is strong evidence that this is precisely what happened: President Eisenhower complied with the Supreme Court's decisions because he regarded the Court's interpretation of the Constitution as authoritative. Richard Kluger points out that

[ Eisenhower] refused ever to say whether he agreed with the Brown decision...

"I think it makes no difference whether or not I endorse it," he said in 1956.

"The Constitution is as the Supreme Court interprets it; and I must conform to that and do my very best to see that it is carried out in this country."

R. Kluger, supra note 33, at 753.
68 This time period is often referred to as the Lochner era, after the Supreme Court's decision in Lochner v. New York, 198 U.S. 45 (1905), which is regarded as the paradigm of judicial decisionmaking during this era. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936); Hammer v. Dagenhart, 247 U.S. 251 (1918).
reflected the Justices imposing their political and economic philosophies. The legislatures and the President could have ignored the decisions and continued to apply the laws declared unconstitutional. However, compliance cannot be taken to reflect the other branches’ agreement with the Court’s values. Rather, the other branches acquiesced because they respected the judiciary’s authority.

Therefore, the fact that the “ultimate decision rests with political actors” does not answer the attack which Professor Carter addresses: judicial review is still antimajoritarian and still imposes the Justices’ values. The fact that the political branches often must act to implement judicial decisions does not make the decisions unimportant or consistent with majority rule.69

Professor Carter’s approach to interpreting the political Constitution fails for similar reasons. Originalism is every bit as inconsistent with majority rule as other theories of judicial review. Judicial review based on the text of the Constitution and the Framers’ intent is antimajoritarian because it involves unelected, unaccountable judges overturning decisions of popularly elected legislatures. Judges applying the Framers’ intent are striking down statutes on the basis of the desires of men who lived two centuries ago. If originalists can criticize activist judicial review for being ruled by nine “Platonic guardians,”70 surely originalism is rule by a small group of long-dead Platonic guardians. The point is again a simple one: judicial review is antimajoritarian even if it strictly adheres to intended constitutional norms.71

Nor can originalism be rescued by claiming that the people consented to the Constitution and therefore application of the Constitution is a reflection of the majority’s will. Not a person alive today, and only a small minority of our ancestors, was a part of the ratification process.72 And because a majority vote is insufficient to amend the Constitution, the absence of amendment cannot be interpreted as implicit consent by the majority.73

69 In fact, if the decisions were legitimate only because of the compliance of the political branches, the political branches should feel no compulsion to comply with the Court’s rulings. In other words, the political branches would have the authority to overrule and disregard the Court’s decisions. In fact, in many instances, the political branches comply only because they feel they must. See supra note 67 and accompanying text.

70 Judge Learned Hand wrote the famous criticism of judicial review: “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).

71 Professor Brest has done an excellent job of demonstrating that originalism is inconsistent with a simple definition of democracy as majority rule. See, Brest, supra note 17, at 225; see also Chemerinsky, supra note 10, at 1226-33 (arguing that all judicial review is antimajoritarian).

72 Bishin, Judicial Review in Democratic Theory, 50 S. CAL. L. REV. 1099, 1111 (1977); Brest, supra note 17, at 225.

73 To amend the Constitution requires both a “super” majority of both Houses of Congress and a “super” majority of states, or a call for a constitutional convention
Finally, as already explained, originalism cannot be defended on the ground that it is value free. The decision to implement the Framers' values is a normative choice. Similarly, judges' values influence the interpretive process both in their understanding of the historical record and how they apply it in deciding cases. In other words, Professor Carter fails to define an interpretive process that answers the critics of judicial review.

E. Undermining the System Being Justified

Thus far, I have tried to demonstrate that Professor Carter fails in his attempt to justify judicial review. This section goes further, contending that Professor Carter's arguments undermine the legitimacy of the very system he is trying to defend. His arguments explaining why judicial review does not violate majority rule make judicial decisions superfluous.

If the Court is just "fine-tuning" the results that would occur even without the judiciary, why is judicial review necessary at all? If all the Court's results would have been "brought about by other means," why keep the institution of judicial review? Professor Carter offers no answers to these questions. In fact, if his argument is true, constitutional judicial review is superfluous and can be eliminated without harm. Any attempt to explain why the Court performs a unique function would undermine Professor Carter's arguments with regard to the fundamental rights decisions.

Similarly, if the political Constitution is unambiguous and self-explanatory, then judicial review is unnecessary because the Congress and Executive branches are unlikely to ignore the clear commands of the document. Judicial review only would be necessary in instances where the document and its intent are ambiguous, where conflicting interpretations are possible. If such instances do not exist, judicial review is unnecessary absent proof that the political branches would violate clear constitutional mandates. If, on the other hand, the Constitution is unclear and ambiguous, then interpretation is necessary, making originalism difficult and value judgments inevitable. In other words, either judicial review is unnecessary or Professor Carter is wrong.

A more basic failing of Professor Carter's argument is that it threatens the legitimacy of judicial review by accepting the critics' premise and then failing to meet their challenge. The critics argue that judicial review is illegitimate if judges impose values not stated or implied in the Constitution. Professor Carter implicitly agrees with this premise and does an excellent job of showing how other commentators fail to counter the objection. He then attempts to show why judges are not imposing their values under his approach. To the extent that his approach fails, his argument seems to show that judicial review is illegitimate. Pathbreaking Supreme Court decisions,

from a "super" majority of the states and ratification by a "super" majority of states. U.S. CONST. art. V.

74 Carter, supra note 2, at 850.
such as those desegregating the schools or protecting privacy and the right to abortion, become suspect.\textsuperscript{75}

However, the critics and Professor Carter err in claiming that judicial review is illegitimate just because it is antiamajoritarian and requires judicial value imposition. Professor Carter and many other theorists begin with the wrong premise, the wrong question, and therefore inevitably come to the wrong answer. This point is addressed in the last section of this article.

III. THE QUESTION ASKED DETERMINES THE ANSWER RECEIVED: CHANGING THE INQUIRY CONCERNING THE LEGITIMACY OF JUDICIAL REVIEW

Critics of judicial review reason from a syllogism:

MAJOR PREMISE: All value decisions in a democracy must be subject to control by electorally accountable institutions in order to be legitimate.

MINOR PREMISE: Judicial decisions are value choices which are not subject to control by electorally accountable institutions.

CONCLUSION: Judicial decisions are illegitimate.

Although its phrasing and form varies,\textsuperscript{76} this is the criticism at the center of the current debate over the legitimacy of judicial review\textsuperscript{77} and this is the

\textsuperscript{75} Many commentators have pointed out that virtually every decision of the Supreme Court protecting individual liberties in the last thirty years cannot be defended on the basis of the Constitution's text or Framers' intent. See M. Perry, The Constitution, the Court, and Human Rights 2 (1982); Conkle, The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond, 69 MINN. L. REV. 587, 596-97, 600-01 (1985).

\textsuperscript{76} One unfortunate characteristic of the literature is that the terms "majority rule" and "democracy" are not defined with any precision. Dean Ely, for example, simply states that majority rule is the core of our political system without ever defining what majority rule is. J. Ely, supra note 17. Professor Perry defines majority rule as a requirement that decisions be subject to control by electorally accountable officials. M. Perry, supra note 75, at 9. But Professor Perry never defines what degree or form of control is sufficient. For example, is the power to overrule decisions with a constitutional amendment sufficient control and, if not, by what theory is it inadequate?

Yet other theorists simply define majority rule as a requirement that all value decisions be made by electorally accountable officials. All judicial review by federal courts is obviously impermissible under this definition. Interestingly, originalists use this definition not to advocate the abolition of judicial review, but rather only to criticize non originalism. See, e.g., R. Burger, supra note 6.

\textsuperscript{77} See, e.g., Constitutional Adjudication and Democratic Theory, 56 N.Y.U. L. REV. 259 (1981) (symposium on the question of reconciling judicial review with democracy); Judicial Review and the Constitution—The Text and Beyond, 8 U.
criticism that Professor Carter attempts to answer.

Professor Carter, like Dean Ely and Professor Perry and most other
defenders of judicial review, grants the critics' major premise. The defenders
all try to respond at the level of the minor premise. Each argues that it is
possible to rescue judicial review and define it so as not to involve impermis-
sible value imposition. Dean Ely argues that judicial review which attempts
to make the political process work by reinforcing representational values is
consistent with the major premise. 78 Professor Perry argues that non-
originalist review by the Supreme Court does not violate the major premise
because Congress has the authority to restrict the Supreme Court's jurisdi-
ciction. 79 Professor Carter argues that judicial review does not violate the major
premise because fundamental rights cases just fine tune and the structure of
government decisions apply clear constitutional mandates.

Professor Carter does an excellent job in the initial part of his article
demonstrating how other scholars fail to define a system of judicial review
that does not violate the major premise. Many others have argued elsewhere
that Dean Ely and Professor Perry fail to define a system where the Court
can avoid imposing values in violation of the major premise. 80 In fact some
critics, such as Professor Tushnet, persuasively argue that all judicial review
inherently must violate the major premise. 81 All judicial review, whether
originalist or not, involves unelected courts overturning decisions of popu-
larly elected officials. All judicial review, whether originalist or not, requires
the Court to make value choices. No theory of judicial review can be applied
in a formalistic way to yield determinate results. Historical records are far
too ambiguous and application allows too much discretion to make even
originalism value free. In short, judicial review by definition is inherently
antimajoritarian.

Does this mean, as the critics claim, that all judicial review is illegitimate?

DAYTON L. REV. 443 (1983) (same); Judicial Review versus Democracy, 42 OHIO
POLITICAL PROCESS 4 (1980) ("Reconciling judicial review with American representa-
tive democracy has been the subject of powerful debate since the earliest days of the
Republic.").

78 J. ELY, supra note 17, at 75-104 (1980).

79 M. PERRY, supra note 75, at 126-38. Professor Perry states that "if in fact
Congress did lack such a power [to restrict Supreme Court jurisdiction], I would not
know how to defend noninterpretive review in terms consistent with the principle of
electorally accountable policy-making." Id.

80 See, e.g., Brest, The Substance of Process, 42 OHIO ST. L.J. 131 (1981);
Chemerinsky, supra note 10, at 1215-26; Conkle, supra note 75; Estreicher,
Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in
the Constitution's Open Texture, 56 N.Y.U. L. REV. 547 (1981); Tribe, The Puzzling
Persistence of Process-Based Constitutional Theories, 89 YALE L.J. 1963 (1980);
Wellington, History and Morals in Constitutional Adjudication (Book Review), 97

81 See supra note 7 (citing works by Professor Tushnet).
The critics' conclusion only follows if their major premise is true. My contention is that the current debate has been misdirected because it has focused on the minor premise and, since they have failed to refute the minor premise, defenders of judicial review have made the practice seem illegitimate. The correct focus should be on why the major premise is false, why it is permissible and desirable to have an institution such as the Supreme Court making value choices even though it is not elected or directly accountable at the polls. Ultimately, scholars should defend why society is better off because the courts desegregated the South, applied the Bill of Rights to the states, protected the right of parents to control the upbringing of their children, and recognized the right to privacy.

My primary goal here is not to present a full refutation of the major premise or a complete defense of non-originalist Supreme Court review. Most of all, I wish to point out that the failure of Professor Carter and others to refute the minor premise does not doom judicial review. Moreover, I hope to encourage others to abandon the attacks on the minor premise and instead to defend judicial review, as it has not yet been defended, by denying the major premise of the syllogism.

To complete my argument here, I want to show the vulnerability of the major premise by sketching out a few of its key defects. First, the major premise begins with an incorrect definition of democracy. Virtually all contemporary constitutional scholars, from defenders of judicial review, such as John Ely and Michael Perry, to its critics, such as Robert Bork and Raoul Berger, define democracy as majority rule. Professor Perry, for example, begins his book by defining democracy as "the political principle that governmental policymaking—by which I simply mean 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." Professor Perry's definition is typical. Most theorists begin their analysis by defining democracy in purely procedural

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82 I am completing work on a much longer essay which attempts to defend non-interpretive review. In that essay I will attempt to demonstrate the desirability of an evolving Constitution; that evolution should occur by interpretation and not solely by amendment; that the judiciary is best suited to carry out the interpretive process; and that no theory of interpretation ever will yield determinative results. Ultimately, I hope to demonstrate that it is desirable for society to have an institution such as the Court identify and protect fundamental values in an antimajoritarian fashion.

83 See J. Ely, supra note 78, at 5; M. Perry, supra note 75, at 9; Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 Ohio St. L.J. 435, 446 (1981) (arguing that "under democratic principles," judges should not substitute their views "for the view of the people"); Bork, supra note 6, at 2-3.

84 M. Perry, supra note 75, at 9.
terms and by requiring that decisions be made or subject to control by
electorally accountable officials.\textsuperscript{85}

Certainly, judicial review is inconsistent with this procedural definition of
democracy; federal judges are unelected and not subject to electoral con-
trol. This could mean that judicial review is improper or it could mean that
everyone is using the wrong definition of democracy. American democracy
does not correspond to a purely procedural definition of democracy as
majority rule. American democracy incorporates numerous substantive val-
ues. For example, a commitment to majority rule as the highest value would
allow majorities to persecute and even exterminate minorities. The Constitu-
tion embodies protection of minority rights. It includes protection of sub-
stantive values such as the freedom of speech and religion, the privacy of the
home from unreasonable searches and seizure, and the inappropriateness of
cruel and unusual punishment.\textsuperscript{86}

In fact, the entire Constitution is an antimajoritarian document. If society
were committed only to majority rule it would not create the system of
government in a document which can be changed only by supermajorities of
numerous institutions. The Constitution, in large part, is based on distrust of
majorities and intentionally takes certain matters out of the hands of social
majorities.

This simple recognition, that critics of judicial review begin with the
wrong definition of American democracy, has enormous implications. At the
very least, redefining democracy removes the rhetorical force from the
critics’ claim that judicial review is inconsistent with democracy. In fact, if
the correct definition of American democracy includes substantive elements,
such as the protection of certain rights, and if judicial review maximizes
protection of those rights, then it enhances rather than undermines Amer-
ican democracy. If the Constitution is viewed as intentionally anti-
ajoritarian, then it is no criticism of judicial review implementing the docu-
ment to say that it, too, is antimajoritarian.

Second, in attacking the major premise, it must be pointed out that all
judicial review, whether originalist or not, inevitably violates the major
premise. All judicial review is antimajoritarian and all requires the imposi-
tion of judicial values. This forces critics either to argue that all judicial
review should be eliminated and that \textit{Marbury v. Madison}\textsuperscript{87} should be

\textsuperscript{85} Saphire, \textit{Making Noninterpretivism Respectable: Michael J. Perry’s Contributions to Constitutional Theory}, 81 \textit{Mich. L. Rev.} 781, 783 n.6 (1983) ("Most theorists accept, as a general proposition, that in our democracy the development and imple-
mentation of public policy is entrusted to institutions and individuals who are accountable to the electorate.").

\textsuperscript{86} See Tribe, \textit{supra} note 80, at 1067 (1980); Brest, \textit{The Fundamental Rights Controversy: The Essential contradicitions of Normative Constitutional Scholarship},

\textsuperscript{87} 5 U.S. (1 Cranch) 137 (1803).
overturned, or to answer the claim that some types of judicial review are so important that they justify sacrificing the principle of majority rule. If the critics argue the former, then the debate shifts completely and becomes a dispute over whether constitutional judicial review is ever desirable. The burden of proof in such a debate will rest with those who are opposing a practice that has existed for almost two hundred years. Those who have long possessed the rhetorical advantage by claiming that Supreme Court decisions are inconsistent with democracy must now make a normative argument as to why all judicial review is inappropriate and why Marbury v. Madison should be overturned.

Alternatively, attackers of judicial review will be forced to argue that certain types of Supreme Court decisions are so important that they justify sacrificing majority rule. Again, notice how the debate shifts. The appropriate question then becomes what values are so important that the Court should protect them from social majorities. This is a question of crucial importance and is exactly what should be debated. Notice, however, that by agreeing that some values are so fundamental as to justify judicial overruling of majority decisions, the attackers of judicial review are forced to abandon their major premise. No longer can they claim that decisions in a democracy are legitimate only if made by electorally accountable officials because they have admitted that some decisions should be made by the Supreme Court. Simply put, by demonstrating that all judicial review is inconsistent with the major premise, critics of judicial review either must attack all judicial review or abandon their major premise. Either move enormously helps the defenders of judicial review.

Third, defenders of judicial review should demonstrate how all theories of judicial review, originalist and non-originalist, leave judges substantial discretion. No theory yields determinate results when applied in specific cases. Judicial decisionmaking would only be discretionless if two things existed. First, there would need to be absolutely clear premises. For each case, there would need to be just one premise (a choice of more than one premise would create discretion), and that premise would have to be completely unambiguous (since ambiguity requires choices in meaning).

Also, there would need to be a reasoning which allows results to be determined entirely by deduction from the premises. Unless courts could apply the premises to particular cases in a syllogistic fashion, judges would have discretion in determining the outcomes. In other words, determinacy exists only if there is a clear rule which can be deductively applied to determine the results in a specific case. This method of decisionmaking is referred to as "formalism."

At least since the time of the legal realists at the beginning of this century, formalism has been regarded, almost universally, as impossible. The constitutional premises from which results are deduced are rarely clear. No model of constitutional decisionmaking can eliminate the need for courts to make choices as to what a constitutional provision means. The inherent
vagueness and ambiguity of language ensures discretion in determining meaning. As argued earlier, under originalism, choices must be made as to whose views count as intent. And even if the relevant group could be identified, those regarded as Framers undoubtedly had a number of different and perhaps conflicting reasons for adopting particular constitutional provisions. Moreover, historiographers prove that any reading of historical materials is inherently subjective, with the values of the interpreter affecting the conclusions reached. Furthermore, even if the premises, the Constitution’s requirements, were clear, judges inevitably still would have discretion in applying the premises to decide specific controversies. Discretion is only eliminated if the premises can be deductively applied to yield conclusions. Legal reasoning, however, is rarely syllogistic.

Thus, inescapably, the judge’s values enter into the interpretation process. The search for value free judicial decisionmaking is an impossible quest and one that should be removed from the discussion over the proper method of court review.

Finally, defenders of judicial review must develop normative arguments directly refuting the major premise. They must explain why it is desirable for society to have the Constitution evolve and why such evolution should occur through interpretation and not just by constitutional amendment. Defenders of judicial review must further demonstrate why the courts are best suited for this interpretive process and how the purposes of the Constitution are best served by having an institution such as the judiciary identify and protect values from the majority of society. None of these arguments seem implausible, and all seem easier to establish than the ability to create a system whereby judges decide cases without making value choices. In other words, the question to be addressed is why is it desirable to have an institution such as the Supreme Court make certain value choices, not how can a model of judicial review be devised whereby the courts avoid value selection and imposition.

IV. Conclusion

Professor Carter writes in a long tradition of constitutional commentators who have tried to rescue judicial review by developing a legitimizing theory. In this essay, I have attempted to demonstrate that Professor Carter fails in his attempt because all who try to develop a value free system of judicial review inevitably must fail. Wrong questions lead to wrong answers. It is time to change the inquiry and focus on why society is better because it has the Supreme Court to order desegregation, protect privacy, and reapportion the legislatures. It is time to ask new questions.