THE SUPREME COURT
1988 TERM

FOREWORD: THE VANISHING CONSTITUTION

Erwin Chemerinsky

TABLE OF CONTENTS

THE VANISHING CONSTITUTION

*Erwin Chemerinsky**

By any standard, the 1988–1989 Supreme Court Term was momentous. Doctrinally, the Court refashioned legal principles in a wide variety of important and controversial areas. The Court narrowed abortion rights, limited government affirmative action programs, restricted the scope of civil rights laws, permitted capital punishment of juveniles and the mentally retarded, approved drug testing, and constricted the availability of habeas corpus.

Philosophically, the Term demonstrated a consistent, conservative working majority on the Court. When Justice Lewis Powell resigned in 1987, it was widely recognized that he had served as a swing vote on the Court, especially on topics such as abortion[1] and affirmative action.[2] The intense battle over the confirmation of Robert Bork to a seat as an associate Justice was motivated, in part, by the likelihood that Justice Powell's replacement would have the decisive vote in many cases.[3] The rejection of Bork, the nomination and withdrawal of Douglas Ginsburg, and the ultimate approval of Anthony Kennedy all heightened interest in the effect on the Court of its newest member. Justice Kennedy's first full Term[4] on the Court provided a clear and resounding initial answer as to his ideology and impact. Joining Chief

---

* Professor of Law, University of Southern California Law Center. I want to thank Scott Altman, Susan Bandes, Randy Barnett, Scott Bice, Robert Bone, William Fletcher, Ron Garet, Louis Kaplow, William Marshall, Dan Meltzer, Judith Resnik, Larry Simon, and especially Stephen Siegel and Marcy Strauss for their very helpful comments on an earlier draft of this Foreword. I am grateful to the participants at faculty workshops at DePaul College of Law, Harvard Law School, and the University of Southern California Law Center for their ideas and suggestions. I also want to thank Richard Adams, Allison Brightman, and Misty Scranton for their excellent research assistance.

[1] *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (invalidating by a 5–4 vote a Pennsylvania law restricting abortions, with Justice Powell voting in the majority).

[2] *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) (approving by a 5–4 vote an affirmative action remedy imposed by a federal court, with Justice Powell voting in the majority); Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986) (approving by a 5–4 vote an affirmative action remedy imposed by a federal court, with Justice Powell voting in the majority).

[3] For example, Senator Joseph Biden, Chair of the Senate Judiciary Committee, commented that "the balance of the Court itself is at stake" in the Senate's review of Robert Bork. *See* 133 CONG. REC. S10522, S10528 (daily ed. July 23, 1987).

[4] Because Justice Kennedy's tenure on the Court began in February 1988, he could not participate in selecting the cases heard by the Court in the 1987–1988 Term and in many of the decisions. The 1987–1988 Term was described as one that "left conservatives yawning and sleepy" and was characterized by Dean Jesse Choper as "the most uneventful term in my professional life." Reuben, *Rehnquist Court Steady Through 'Transitional' Year*, L.A. Daily J., July 5, 1988, at 1, col. 6.

Justice Rehnquist and Justices White, O'Connor, and Scalia, Justice Kennedy supplied the critical fifth vote in a series of conservative 5–4 decisions in cases concerning abortion,[5] capital punishment,[6] civil rights,[7] and criminal procedure.[8]

The decisions of last Term will profoundly affect human lives. Many women will find it harder to obtain abortions; more workers will be subjected to drug tests; fewer civil rights plaintiffs will prevail, perhaps lessening the deterrent to employment discrimination; more individuals, in particular juveniles and the mentally retarded, will be executed.

For conservatives, this is a year of rejoicing. The Reagan legacy of a conservative Court seems secure for many years to come. For liberals, it is a time of despair. The 1988–1989 Term was devastating for civil rights and civil liberties.[9]

It is tempting to describe the Term, and the Rehnquist Court, in a single sentence: there is now a very conservative Court that reaches consistently conservative decisions.[10] Whatever the truth of this statement, its simplicity provides an insufficient understanding of this Court's approach to constitutional law. The Rehnquist Court's judicial philosophy obviously differs from that of either the *Lochner* era, which focused on aggressive judicial protection of economic rights, or the Warren Court, which saw its role as safeguarding fundamental rights and racial minorities.[11]

---

[5] *See* Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989) (upholding a statute that restricted the availability of abortions in public health facilities).

[6] *See* Penry v. Lynaugh, 109 S. Ct. 2934 (1989) (allowing capital punishment of the mentally retarded); Stanford v. Kentucky, 109 S. Ct. 2969 (1989) (allowing capital punishment of 16- and 17-year-olds).

[7] *See* Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (refusing to allow a cause of action under 42 U.S.C. § 1981 for racial harassment relating to the conditions of employment); Martin v. Wilks, 109 S. Ct. 2180 (1989) (allowing challenges to consent decrees in employment discrimination cases); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (interpreting the standard for establishing a prima facie disparate impact case under title VII of the Civil Rights Act of 1964).

[8] *See* Duckworth v. Egan, 109 S. Ct. 2875 (1989) (holding that, in a police interrogation, *Miranda* warnings need only reasonably convey to a suspect his rights, not mirror the exact form described in *Miranda*).

[9] Ralph Neas, executive director of the Leadership Conference on Civil Rights, remarked: "We lost more in 2 1/2 weeks than we lost in the previous 2 1/2 decades." Savage & Lauter, *Rehnquist Gavels an End to Era of Judicial Activism*, L.A. Times, July 7, 1989, at 24, col. 2.

[10] The term "conservative" is used throughout this Foreword as it is commonly understood in contemporary American politics. It seems uncontroversial to refer to President Ronald Reagan and his nominees to the Supreme Court as conservative. The term will not be used except in this descriptive sense; no normative connotations are intended.

[11] For a description of *Lochner* era jurisprudence, see p. 50 below. The Warren Court's paradigm has been characterized as implementing the philosophy behind the famous *Carolene Products* footnote, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See* J. ELY, DEMOCRACY AND DISTRUST 75 (1980) ("The Warren Court's approach was foreshadowed

This Foreword attempts to describe and analyze the Rehnquist Court's jurisprudence. Part I describes the Rehnquist Court's approach to judicial review. Constitutional law is primarily about two interrelated questions: what substantive meaning to impart to constitutional provisions; and what institutional role the judiciary should occupy. The Rehnquist Court lacks a theory for how the Constitution should be interpreted, and instead approaches judicial review based on an oft-stated desire to avoid judicial value imposition. Thus, the Court's jurisprudence is largely defined negatively, by what it wants to avoid. Without a method of constitutional interpretation, but being committed to judicial neutrality, the Court frequently defers to government decisions and rejects constitutional claims. The Court's decisionmaking, and its implicit view of its institutional role, is highly majoritarian, as is evidenced by its decisions repeatedly siding with the elected branches of government.

Certainly, the Court's rulings reflect the ideology of its majority. But to view the Court entirely from a political perspective is to overlook the many forces that have produced the current approach to constitutional decisionmaking. The quest for judicial value neutrality, and the strong majoritarianism that flows from it, should not be seen merely as a product of a politically conservative Court. Hence, Part II describes the many interrelated events and pressures that have given rise to the Rehnquist Court's view of the judicial role.

For several decades, the scholarly literature about judicial review has been dominated by a quest for objective constitutional principles and a conviction that judicial review is a deviant institution in a democratic society. As discussed in Part III, this position, and the Rehnquist Court's implicit adherence to it, is seriously flawed. In allocating decisionmaking authority among government institutions, the approach misconceives the nature of American democracy and inadequately weighs the relative strengths of each branch of government. In dealing with the substantive issues that the Supreme Court must resolve, the approach pursues a futile quest for value neutrality rather than an inquiry as to what values are worthy of constitutional protection under what circumstances.

---

in a famous footnote in *Carolene Products* . . . ."). The Warren Court's paradigm is described at pp. 50–51 below. The Burger Court is much harder to characterize. Eleven years ago Professor Ely wrote that the Burger Court could not be understood as a *Carolene Products* Court. *See* Ely, *The Supreme Court, 1977 Term — Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 12 (1978). Others, too, remarked on the difficulty of identifying a unifying theme for the Burger Court's decisions. *See, e.g.*, Blasi, *The Rootless Activism of the Burger Court*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 198, 214 (V. Blasi ed. 1983). Perhaps the Burger Court, though conservative in many of its rulings, will be regarded in history as a transitional Court from the liberal Warren Court to the even more conservative Rehnquist Court.

Moreover, I believe that the Court's approach to judicial review will have disastrous consequences for constitutional law and for the nation. Worst of all, the approach is leading to a vanishing Constitution. Fewer clauses of the Constitution, whether dealing with the structure of government or with individual liberties, are being enforced. Majoritarianism is a jealous philosophy that tolerates little judicial review. If judges can intervene only when there are clear "objective" standards, wholly apart from the views of the individual Justices, judicial review will serve primarily to uphold and legitimate legislative and executive decisions.

Finally, Part IV suggests that an alternative paradigm for constitutional law is imperative. The new approach must recognize the inevitability and desirability of judicial value choices in deciding constitutional cases. Furthermore, decisionmaking by electorally accountable institutions should no longer be presumed to be superior to that by the judiciary; a far more sophisticated institutional analysis is required. Thus, at minimum, the justification offered by the Court that it is avoiding judicial value imposition or that it is deferring to elected officials should not suffice to reject constitutional claims. Abandoning the search for value neutrality and the strong presumption for majoritarianism has the potential to improve significantly both the theory and practice of constitutional law.

Ultimately, constitutional law is a matter of defining and protecting society's most cherished values. The paradigm for constitutional law must facilitate discussion and decisionmaking as to which matters to leave to the political process and which to safeguard from it. The focus on majoritarianism masks and obscures the Court's value choices and should be replaced by an approach that directs attention to the difficult conflicts at the core of constitutional law. The very existence of the Constitution is based on the tension between a need for a government to protect and provide for the people, and a fear of the government's exercise of power. The Rehnquist Court, thus far, seems willing to approve broad governmental powers, but is unwilling to continue many of the limits created by its predecessors. The jurisprudence of the Rehnquist Court thus forces attention to the central question: will the Court and the Constitution continue to protect people from the government? If not, who will?

I. In Search of the Rehnquist Court's Jurisprudence

In some ways, it may be premature to talk about the Rehnquist Court's jurisprudence. William Rehnquist has been Chief Justice for only three Terms and Justice Kennedy has been on the bench for slightly more than a year. Moreover, speaking of the "Rehnquist Court" is misleading if it connotes nine Justices of a single mind who

write in a single voice. Last Term, the Court was often splintered; many cases were decided by plurality and concurring opinions.[12]

Nonetheless, with these caveats in mind, searching for a "Rehnquist Court jurisprudence" is still sensible. Chief Justice Rehnquist and Justices White and O'Connor have articulated their philosophies for many years, and many of the current Court's themes were expressed in earlier Burger Court opinions. Moreover, last Term revealed substantial areas of agreement among five members of the Court — Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy. Their shared views, described below, largely define the Rehnquist Court's approach to constitutional law.[13]

A. What Animates the Rehnquist Court?

Reading through the 100-odd decisions of last Term, one is hard pressed to find a coherent approach to constitutional decisionmaking. The Court seemed to struggle to piece together pluralities or bare majorities and in doing so its reasoning was quite uneven and inconsistent.

If a jurisprudential theme can be identified, it is the Court's search for judicial neutrality.[14] Expressing a desire to defer to legislative and executive decisionmaking, the Court frequently declared that it would hold government actions unconstitutional only when guided by clearly established constitutional principles that exist entirely apart from the

---

[12] *See The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 394 (1989) (listing 116 dissenting and 88 concurring opinions).

[13] Of course, the alignment of the Justices in constitutional cases is not constant. For example, there are instances in which Justice Stevens voted with the more conservative members of the Court. *See, e.g.*, Texas v. Johnson, 109 S. Ct. 2533, 2555 (1989) (Stevens, J., dissenting); Michael H. v. Gerald D., 109 S. Ct. 2333, 2347 (1989) (Stevens, J., concurring in the judgment). Similarly, Justices White, O'Connor, Scalia, and Kennedy have sometimes voted with the more liberal Justices. *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 109 S. Ct. 3086 (1989) (Justice O'Connor joined in large part Justice Blackmun's opinion) *Johnson*, 109 S. Ct. 2533 (Justices Scalia and Kennedy joined Justices Brennan, Marshall and Blackmun in the majority); *Michael H.*, 109 S. Ct. at 2360 (White, J., dissenting); NCAA v. Tarkanian, 109 S. Ct. 454, 466 (1989) (White, J., dissenting). Thus, I do not suggest absolute consistency among the Justices in their ideology or voting patterns, but rather mean to describe tendencies that are strong enough to be predictive and descriptively accurate. Statistical analysis of last Term confirms the frequency with which Chief Justice Rehnquist and Justices White, O'Connor, Scalia, and Kennedy constituted the majority in 5–4 decisions. Of 33 5–4 decisions, these five Justices comprised the majority 19 times. No other group of five Justices comprised the majority in 5–4 decisions more than three times. *See The Supreme Court, 1988 Term — Leading Cases*, 103 HARV. L. REV. 137, 397 (1989).

[14] The term "judicial neutrality" refers to a desire for a method of judging that excludes the personal preferences of the Justices from the decisionmaking process. In other words, it describes decisions based on principles that exist and are applied wholly apart from the preferences of the individuals on the Court. The Court's commitment to this philosophy is discussed at p. 49 below.

preferences of the Justices. For instance, the Court concluded that to reject the Kentucky legislature's choice allowing capital punishment for sixteen and seventeen year-olds would be improperly to follow "our personal preferences" and "to replace judges of the law with a committee of philosopher-kings."[15] Similarly, Justice Scalia, writing for a plurality, rejected a substantive due process claim of an unmarried father and warned that recognizing such rights would make constitutional law "'the predilections of those who happen at the time to be Members of this Court.'"[16] In *Bowers v. Hardwick*,[17] decided three years ago, Justice White, writing for the majority, ruled that the constitutional right to privacy does not protect private, consensual homosexual activity and explained that invalidating a Georgia statute prohibiting such activity would amount to the "imposition of the Justices' own values on the States."[18]

Thus, the Rehnquist Court's jurisprudence is privative — defined not positively, but negatively. The Court is animated not by an affirmative view of the Court's role or of constitutional values to be upheld, but rather by a vision of the bounds of judicial behavior. Although the Justices surely must recognize that they make value choices in constitutional decisionmaking, the Justices never acknowledge such value choices nor discuss permissible types of value judgments. Instead, the Court broadly condemns any decisions that are based on the views of the Justices.

The Court's privative jurisprudence might be motivated by a number of convictions. The Court may hold a position of moral skepticism — doubting that there are correct answers and thus unwilling to risk value judgments.[19] Or the Court might maintain — not inconsistent with the recent "revival" in republican thought[20] — that the Court should restrain itself because the judicial branch offers citizens the smallest role in the collective enterprise of self-government. Or the Court may believe that, as an institution, the judicial branch is less responsive and responsible to the citizenry and that the Court should defer in all but the most extreme cases.[21] Because the Court only

---

[15] Stanford v. Kentucky, 109 S. Ct. 2969, 2980 (1989) (plurality opinion).

[16] *Michael H.*, 109 S. Ct. at 2341 (plurality opinion) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

[17] 478 U.S. 186 (1986).

[18] *Id.* at 191.

[19] Justice Rehnquist, in an article written more than a decade ago, expressed such moral skepticism as a reason why the values of the Justices cannot be the basis for judicial review. *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 593, 704 (1976). Not surprisingly, however, such moral skepticism is not expressed in judicial opinions.

[20] *See generally* Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988). However, the Court has not invoked republican theory, even implicitly, as a basis for its rulings.

[21] The discussion throughout this Foreword implies that the Court is animated, in large part,

thinly sketches its reasoning, it is not clear which form of deference it adopts. What is clear is that a desire *not* to impose judicial values is central to the Rehnquist Court's statements of its jurisprudence.

The current Court's approach to judicial review is particularly apparent when compared to the approaches of Courts during this century in which the Justices had more affirmative theories of constitutional law. Neither the *Lochner* era Court nor the Warren Court repeatedly stated that it had to avoid value imposition. Quite the contrary, during the *Lochner* era[22] the Court aggressively protected state sovereignty by invalidating federal statutes as exceeding the scope of Congress' commerce and spending powers. The *Lochner* era Court also actively safeguarded economic liberties by ruling unconstitutional numerous state laws as interfering with freedom of contract.[23] The Warren Court protected individual liberties by frequently identifying and enforcing fundamental rights, such as travel, privacy, and voting.[24] The Warren Court is perhaps best remembered for its civil rights decisions, which declared unconstitutional laws existing in most Southern states that required separation of the races in education and the use of public facilities.[25]

Although these Courts were substantively very different, both clearly articulated an approach to judicial review that focused on aggressive judicial protection of certain rights. Also, each Court had an institutional theory about the judiciary's role; the *Lochner* era

---

by a desire to defer to majoritarian decisionmaking, defined as decisions by electorally accountable branches of government. This, too, is privative in that it emphasizes not overruling majoritarian choices. The Court obviously is not completely majoritarian; it occasionally accepts constitutional claims and rules against the government. However, the Court has not articulated any theory for when it will overrule majoritarian decisionmaking. Thus, what is missing is an affirmative theory as to the circumstances under which constitutional values should trump choices by elected branches of government.

[22] The phrase "*Lochner* era" refers to the period from the late nineteenth century until 1937 in which the Court used economic substantive due process to invalidate state economic regulations. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2, at 567–68 (2d ed. 1988) (describing the origin and use of the term "*Lochner* era"). Professor Tribe also explains that the "basic justification for judicial intervention under *Lochner* . . . [was] that the courts were restoring the natural order which had been upset by the legislature." *Id.* § 8-6, at 578–79.

[23] *See, e.g.*, Williams v. Standard Oil, 278 U.S. 235 (1929) (invalidating gasoline price regulations); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (invalidating a minimum wage law for women); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating a state law prohibiting "yellow dog" contracts); Adair v. United States, 208 U.S. 161 (1908) (invalidating similar federal legislation); *see also* L. TRIBE, *supra* note 22, § 8-2, at 567 n.2 (presenting statistics that almost 200 laws were invalidated from 1899 to 1937).

[24] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (protecting the right of interstate travel); Griswold v. Connecticut, 381 U.S. 479 (1965) (holding that a statute barring use of contraceptives violated the right to marital privacy); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that in the absence of legitimate state objectives to the contrary, representation in a state legislature must be closely based upon population).

[25] *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954).

Court saw its central task as enforcing the boundaries between federal and state government, and between the state and the individual.[26] The Warren Court viewed its role especially as assuring the just functioning of the democratic process.[27] In contrast, the Rehnquist Court often approaches substantive questions with only a view of what it wants to avoid — value imposition — and addresses its institutional role with an implicit desire to defer to majoritarian decisionmaking.[28]

B. The Absence of a Consistent Interpretive Theory

The Rehnquist Court's jurisprudence is, at best, inchoate and, at worst, incoherent. Viewing judicial review as inconsistent with majority rule, the Rehnquist Court insists on principles external to the Justices' values, but offers no guidance as to what constitutes such principles or how they are to be determined. In fact, the Court is quite inconsistent in its apparent method of constitutional interpretation. As discussed below, the conservative majority of the Rehnquist Court at times adopts and at times rejects originalism, process theory, and tradition as the basis for constitutional interpretation. A commitment to judicial neutrality leads to repeated rejection of constitutional claims unless there is a theory of how such principles are to be ascertained. Seen another way, the Rehnquist Court's jurisprudence is negative in that it emphasizes what Justices should not be doing, but lacks a theory of how the Court should interpret the Constitution. Although some constitutional scholars begin with a position on constitutional interpretation and develop a theory of judicial review secondarily,[29] the Rehnquist Court seems driven by its commitment to value-neutral judging and is left groping for a theory of constitutional interpretation in its effort to exercise judicial review.

Although for the past two decades conservative scholars have championed originalist constitutional interpretation,[30] the Rehnquist Court has not consistently followed this philosophy. At times the Court has emphasized fidelity to the Constitution's text and to the

---

[26] *See* L. TRIBE, *supra* note 22, § 8-1, at 564.

[27] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 73–74.

[28] In fact, what distinguishes the frequently dissenting Justices — Brennan, Marshall, Blackmun, and Stevens — is the absence in their opinions of calls for the avoidance of judicial value imposition. These Justices consistently advocate a role for the judiciary that is animated by a desire to vindicate constitutional claims, not by a view of what the judiciary should avoid.

[29] For example, prominent commentators such as Professors Laurence Tribe and Ronald Dworkin direct their attention to constitutional interpretation and view defining the judicial role as secondary to broader questions. *See, e.g.*, L. TRIBE, *supra* note 22, at viii; R. DWORKIN, LAW'S EMPIRE (1986); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[30] *See, e.g.*, R. BERGER, GOVERNMENT BY JUDICIARY (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

framers' intent, but in many other instances the same Justices reach results that are contrary to those that the originalist approach would reach.[31]

Last Term, for example, the Court held that the government's failure to protect adequately a child from a parent's physical abuse that caused irreversible brain damage was not actionable under the due process clause.[32] The Court declared that "nothing in the language of the due process clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private actors."[33] Similarly, in concluding that the eleventh amendment barred a state from being sued by its own citizens, five Justices emphasized that the framers intended that the states would retain their sovereign immunity, even when the states were sued for violating the Constitution.[34] The Justices spoke of "a consensus that the doctrine of sovereign immunity, for States as well as the Federal Government, was part of the understood background against which the Constitution was adopted."[35]

But in many other instances during the 1988–1989 Term, the same Justices who were the majority in these cases disregarded the text and the framers' intent. For example, the Court held that the fourth amendment did not preclude the testing of customs workers for drug use even though there was no individualized suspicion and no evidence of a drug problem in the customs service.[36] Above all else, however, it is clear that the framers sought to eliminate general searches and

---

[31] In Bowers v. Hardwick, 478 U.S. 186 (1986), for example, the Court expressed a strong unwillingness to expand "the category of rights deemed to be fundamental" or to protect rights that are not clear in the "language or design of the Constitution." *Id.* at 194–95.

[32] *See* DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989).

[33] *Id.* at 1003.

[34] *See* Pennsylvania v. Union Gas Co., 109 S. Ct. 2273 (1989). Three Justices joined Justice Scalia's opinion that concluded that Hans v. Louisiana, 134 U.S. 1 (1890), should be reaffirmed and states should be immune from suits by their own citizens. *See* 109 S. Ct. at 2296–99 (Scalia, J., concurring in part and dissenting in part). In a concurring opinion, Justice White also expressed the view that *Hans* should be reaffirmed. *See id.* at 2295 (White, J., concurring in part and dissenting in part).

[35] 109 S. Ct. at 2296–302. However, this history is very much disputed. Many who argue against *Hans* also base their argument on the framers' intent. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting). A substantial body of scholarly literature advocates the overruling of *Hans*. *See, e.g.*, Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983); Gibbons, *The Eleventh Amendment and Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Marshall, *Fighting the Words of the Eleventh Amendment*, 102 HARV. L. REV. 1342 (1989); Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 HARV. L. REV. 61 (1984).

[36] *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); *see also* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989) (approving drug testing of railway workers after railroad accidents).

wanted to limit searches to instances where there was reason to suspect a particular individual of wrongdoing.[37]

The Supreme Court's disregard of the framers' intent is also evidenced in its approval of broad delegations of legislative power to government agencies. For example, in *Mistretta v. United States*,[38] the Court upheld the constitutionality of the federal Sentencing Commission's broad authority to prescribe sentencing guidelines for federal courts.[39] Although Congress delegated substantial lawmaking authority to this new agency, the Court approved the law. In another case, the Court upheld the constitutionality of a federal statute that authorizes the Secretary of Transportation to impose user fees to cover the costs of federal pipeline safety programs.[40] The framers of the Constitution certainly did not envision such sweeping delegations of legislative authority, and there is strong evidence that they would have disapproved of such actions.[41]

In fact, *Mistretta* is internally inconsistent in its use of constitutional history. Considering the constitutionality of the Sentencing Commission raised two issues: whether the Commission was an impermissible delegation of powers and whether the participation of judges on the Commission violated the separation of powers. The Supreme Court extensively discussed the framers' intent as to the latter issue, but completely omitted it from the discussion of the former even though the delegation issue was considered at the Constitutional Convention. One is left with the impression that the Court is originalist only when it justifies the result that the Court wants.

Nor can this Court be understood, as the Warren Court has been described, as consistently animated by a desire to improve the process of democratic government. Pursuant to the famous *Carolene Products* footnote, the judicial role is especially to reinforce majority rule, for example, by ensuring equal representation in the electoral process, by protecting discrete and insular minorities, and by assuring fair pro-

---

[37] *See* Weeks v. United States, 232 U.S. 383, 390, 392–93 (1914) (stating that the fourth amendment was based on a desire to eliminate general warrants and protect privacy); *cf.* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(a) (2d ed. 1987) (describing the intent behind the fourth amendment).

[38] 109 S. Ct. 647 (1989).

[39] *See id.*

[40] *See* Skinner v. Mid-America Pipeline Co., 109 S. Ct. 1726 (1989).

[41] As with most issues concerning the framers' intent, definitive statements are impossible. However, the delegates at the Constitutional Convention rejected a proposal that would explicitly have allowed the legislature to delegate powers to the executive. *See* 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 67 (rev. ed. 1966). Moreover, the Supreme Court has recognized nondelegation as a principle embedded in the framers' intent. In Marshall Field & Co. v. Clark, 143 U.S. 649 (1892), the Court declared: "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692.

cesses of government decisionmaking.[42] Some of the Court's rulings during the 1988–1989 Term can be understood as a continuation of this process philosophy. For example, the Court declared unconstitutional property ownership as a qualification for membership on a government board[43] and invalidated a method of electing the Board of Estimate of the City of New York because it did not adhere to the requirement of one-person-one-vote.[44]

Other cases show a Court that has disdained the *Carolene Products* philosophy. For example, the Court approvingly cited the *Carolene Products* footnote only once last Term — in striking down Richmond, Virginia's affirmative action program.[45] In *City of Richmond v. J.A. Croson Co.*, the Court said that affirmative action programs must meet strict scrutiny and that a set-aside of public funds for minority-owned businesses requires clear proof of past discrimination. Justice O'Connor invoked *Carolene Products* to explain that because Richmond had a majority of blacks in its population its affirmative action program favoring minorities was suspect.[46] The fact that Justice O'Connor implicitly regarded a white population of almost fifty percent as "discrete and insular" reveals how much the current Court has shifted from the *Carolene Products* approach.[47]

---

[42] *See, e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); *see also* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 74–77 (arguing that the Warren Court can be understood as implementing the *Carolene Products* footnote).

[43] *See* Quinn v. Millsap, 109 S. Ct. 2324 (1989).

[44] *See* Board of Estimate v. Morris, 109 S. Ct. 1433 (1989).

[45] *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 722 (1989).

[46] Justice O'Connor wrote:

> In this case, blacks comprise approximately 50% of the population of the city of Richmond. Five of the nine seats on the City Council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.

Id. The Court then quoted with approval Professor Ely's statement: "'Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominately Black legislature.'" *Id.* (quoting Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974)).

[47] The basis for heightened scrutiny under the *Carolene Products* footnote has been to protect "discrete and insular" minorities. "Discrete and insular" traditionally has referred to groups that have been historically discriminated against and politically disadvantaged. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (describing criteria for "suspect" classifications); Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 729 (1985) (discussing the meaning of "discrete and insular"). Whites certainly have not been historically discriminated against or politically disadvantaged, particularly not in Richmond, Virginia. *See Croson*, 109 S. Ct. at 753 (Marshall, J., dissenting).

Additionally, the Court's narrow interpretations of federal civil rights laws indicate that the Rehnquist Court is not motivated by a desire to advance the interests of racial minorities, the traditional "discrete and insular minorities." *See, e.g.*, Jett v. Dallas Indep. School Dist., 109 S. Ct. 2702 (1989) (limiting suits against municipalities under 42 U.S.C. § 1981); Patterson v. McLean Credit Union, 109 S. Ct. 2363 (1989) (limiting suits under 42 U.S.C. § 1981 to

The commitment to process — especially as followed by the Warren Court — emphasized assuring the availability of a fair process for criminal defendants. For instance, the Warren Court substantially expanded the availability of federal court habeas corpus review for prisoners who claimed to be held in custody in violation of the Constitution or laws of the United States.[48] Last Term, however, the Court greatly restricted the use of the federal habeas corpus writ. In *Teague v. Lane*,[49] the Supreme Court severely limited the ability of federal courts to hear constitutional claims raised in habeas corpus petitions.[50] In *Teague*, the Court held that when a habeas petition asks a federal court to create a new rule recognizing a constitutional right, the court may not decide the matter unless it is a right that would be applied retroactively.[51] Because very few criminal procedure rights have retroactive application and because the Court broadly defined what constitutes a "new rule," *Teague* will prevent habeas petitions from presenting claims except as to rights that have been previously established.[52]

But this also is not a Court that appears to be developing a judicial approach of its own. Justice Scalia, at times, endorses a view that

---

discrimination in the formation of contracts); Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989) (limiting the statistical evidence that can establish an employment discrimination claim).

[48] *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (permitting state court prisoners to raise matters on federal habeas corpus that were not raised in state court unless they deliberately bypassed state court procedures); Brown v. Allen, 344 U.S. 443 (1953) (allowing state court prisoners to relitigate federal constitutional claims on federal habeas corpus). For a discussion of the constitutional and statutory provisions concerning habeas corpus, and the history of the writ in the United States, see E. CHEMERINSKY, FEDERAL JURISDICTION 677–90 (1989).

[49] 109 S. Ct. 1060 (1989).

[50] *See id.* at 1072–75.

[51] *See id.* at 1069 ("Retroactivity is properly treated as a threshold question."). Before *Teague*, the Supreme Court had considered habeas corpus petitions alleging constitutional violations, even when they asked the Court to recognize a new constitutional right that would not be applied retroactively in other cases. When the Court articulated a new right, it benefited the habeas petitioner and future criminal defendants. The Court subsequently decided, in another case, whether to apply retroactively the right to benefit others. In *Teague*, by ruling that retroactivity is a threshold determination, the Supreme Court prevented federal courts from hearing habeas petitions asking the court to recognize new rights unless such rights would be retroactively applied in all cases.

[52] *Teague*'s retroactivity test derives from Justice Harlan's opinion in Mackey v. United States, 401 U.S. 667, 675–702 (1971) (Harlan, J., concurring in part and dissenting in part). The test generally prevents retroactive application of criminal procedure rules. *See* Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557 (1975). The Court in *Teague* recognized that retroactivity is rare. *See* 109 S. Ct. at 1072. The Court expansively defined a "new rule" by explaining that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. . . . [A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 1070 (citation omitted). Countless criminal procedure protections were recognized in cases arising from habeas petitions. *See id.* at 1088–90 (Brennan, J., dissenting) (listing new rights protected via habeas petitions).

constitutional interpretation, at least in due process cases, should be guided by traditions stated at the most specific level of abstraction.[53] In *Michael H. v. Gerald D.*, the dissent argued that a California law was unconstitutional in that it prevented a biological father from establishing paternity and seeking visitation rights and noted the tradition of protecting rights of unmarried fathers.[54] Justice Scalia responded that this general tradition was irrelevant. He explained that "[b]ecause such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. . . . [A] rule of law that binds neither by text nor by any particular, identifiable tradition, is no rule of law at all."[55] Justice Scalia ruled against the plaintiff because there is a specific tradition of not protecting biological fathers' rights to children conceived by a mother married to someone else.

At other times, Justice Scalia appears to give little weight to tradition in his decisionmaking.[56] He voted to invalidate Richmond, Virginia's set-aside of public works money for minority-owned businesses,[57] even though such programs have existed for almost a quarter century. Also, in one of the most publicized cases of the Term, Justice Scalia voted with the majority that a state law prohibiting flag burning was unconstitutional, despite a strong tradition forbidding that practice.[58]

Certainly, the absence of a consistent theory of constitutional interpretation is not unique to the Rehnquist Court. But the fact that the same Justices simultaneously embrace and disregard the text, history, process, and tradition further confirms that this Court lacks a coherent constitutional jurisprudence. Reading the decisions leaves one with the sense that the Court invokes whatever interpretive method justifies a particular decision, a criticism that is particularly trenchant for a Court that professes a desire for judicial neutrality.

C. The Default to Deference

The Court's desire to avoid judicial value impositions combined with its commitment to deferring to majoritarian decisionmaking pro-

---

[53] *See* Michael H. v. Gerald D., 109 S. Ct. 2333 (1989).

[54] *See id.* at 2349, 2352 (Brennan, J., dissenting).

[55] 109 S. Ct. at 2344 n.6 ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.").

[56] Justice Scalia might believe that tradition should be used only for cases involving due process claims and that other methods of interpretation should be used for different constitutional provisions. He has not yet explained or justified such an interpretive theory.

[57] *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 735 (1989) (Scalia, J., concurring). In its prior case involving set-asides, the Court upheld the affirmative action program. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a federal requirement to set aside public works monies for minority-owned businesses).

[58] *See* Texas v. Johnson, 109 S. Ct. 2533 (1989).

duces a sweeping judicial deference. The Court's inability to develop a theory of interpretation consistent with its premises — a theory for when it should accept constitutional claims and hold against the government — leaves the Court in a very deferential posture.

Thus, one obvious consequence of the Court's jurisprudence is that the government generally wins constitutional cases. For example, the decisions of last Term indicate that criminal defendants, litigants asserting substantive due process claims, and individuals asking the Court to recognize additional fundamental rights are very unlikely to prevail.[59] Moreover, the Court restricted federal court jurisdiction by reaffirming the immunity of state governments to suit[60] and by limiting the availability of habeas corpus.[61] These restrictions on jurisdiction have a profound majoritarian effect because the government necessarily wins when the Court dismisses a constitutional claim.

Statistics support the conclusion that the current Court frequently rules in favor of the government in constitutional cases. For example, in forty-seven non-unanimous decisions in constitutional cases during the 1988–1989 Term, Chief Justice Rehnquist voted against the government only twice.[62] Similarly, in non-unanimous cases, Justice Ken-

---

[59] Last Term, the Court rejected several constitutional claims by criminal defendants. *See, e.g.*, Florida v. Riley, 109 S. Ct. 693 (1989) (approving naked-eye aerial surveillance of a person's home without a warrant); United States v. Sokolow, 109 S. Ct. 1581 (1989) (upholding the DEA's use of drug courier profiles as a means of establishing a reasonable suspicion to stop suspects); Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646 (1989) (approving forfeiture of assets allegedly obtained through drug sales even when it will prevent a defendant from obtaining defense counsel of his or her choice); United States v. Monsanto, 109 S. Ct. 2657 (1989) (upholding a federal statute which allows district courts to freeze assets in defendants' possession). For examples of cases rejecting substantive due process claims, see DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989), which found that the due process clause does not impose on states an affirmative duty to protect a child against his father's violence; and Graham v. Connor, 109 S. Ct. 1865 (1989), which held that § 1983 claims regarding use of excessive force during an arrest are judged using the fourth amendment's "objective reasonableness" standard and not the substantive due process test. For examples of cases rejecting fundamental rights claims, see Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989), which upheld a statute that restricted the availability of abortions in public health facilities; and Michael H. v. Gerald D., 109 S. Ct. 2333 (1989), which held that it is a question of legislative policy whether a rebuttable presumption can establish that a child conceived during marriage is the child of the husband.

[60] *See* Will v. Michigan Dep't of State Police, 109 S. Ct. 2304 (1989) (holding that neither states nor state officials acting in their official capacities are "persons" within the meaning of § 1983); Dellmuth v. Muth, 109 S. Ct. 2397 (1989) (holding that the Education of the Handicapped Act did not abrogate a state's eleventh amendment immunity from suit); Hoffman v. Connecticut Dep't of Income Maintenance, 109 S. Ct. 2818 (1989) (concluding that § 106(c) of the Bankruptcy Code abrogates sovereign immunity only to the extent necessary to determine a state's rights in the debtor's estate).

[61] *See* Teague v. Lane, 109 S. Ct. 1060 (1989) (limiting collateral use of habeas corpus to cases in which the constitutional rule would be applied retroactively).

[62] *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989); Olden v. Kentucky, 109 S. Ct. 480 (1988) (per curiam).

nedy voted against the government only five times.[63] The government prevailed in seventy-nine percent of the non-unanimous decisions in constitutional cases before the Supreme Court last Term.[64]

To place this in context, consider similar statistics for the Terms of ten, twenty, and thirty years ago. If all decisions, including unanimous rulings, are considered, the government won sixty-six percent of the constitutional cases last Term.[65] Ten years ago, in the 1978–1979 Term (during the middle of the Burger Court's era), the government won fifty-nine percent of the cases.[66] Twenty years ago, in 1968–1969, during the last year of the Warren Court, the government prevailed in only twenty-three percent of the constitutional decisions.[67] In 1958–1959, the fifth year of the Warren era, the Court ruled in favor of the government in fifty-five percent of the decisions.[68]

I do not want to make too much of these statistics. The numbers do not distinguish cases based on their importance or the type of issues presented.[69] The statistical method is hardly rigorous.[70] The statistics

---

[63] *See* Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989) (Kennedy, J., concurring); Healy v. Beer Institute, 109 S. Ct. 2491 (1989); Barnard v. Thorstenn, 109 S. Ct. 1294 (1989); *Croson*, 109 S. Ct. 706, 734 (Kennedy, J., concurring in part and concurring in the judgment); Olden v. Kentucky, 109 S. Ct. 480 (1988) (per curiam).

[64] *See* Survey of Supreme Court Cases (author's calculations on file at the Harvard Law School Library). These statistics include cases raising a constitutional issue that involve the government as a party (but exclude cases between two government entities).

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] Dean Geoffrey Stone has conducted a similar statistical analysis focusing on the Supreme Court's decisions in individual rights cases and found substantial deference. Stone, *O.T. 1983 and the Era of Aggressive Majoritarianism: A Court in Transition*, 19 GA. L. REV. 15, 16–17 (1984). I have chosen to include all constitutional cases involving the government as a party because I believe the quest for judicial neutrality and the implicit deference to majoritarian decisionmaking pervades all of the Court's decisions.

[70] Although there likely are many problems with these statistics, two which might seem apparent should not be regarded as troubling. First, if the lower federal courts are disproportionately likely to rule against the government in constitutional cases, the Supreme Court's ruling for the government would be less indicative of its approach to judicial review and more simply corrective. However, because Republican Presidents have appointed most of the current lower federal court judges, and because such judges tend to rule in favor of the government in most constitutional cases, the statistics cannot be explained by the Court's need to correct lower court biases against the government. *See* Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 191–92 (1988) (discussing the number of federal judges appointed by President Reagan and their voting patterns); Gottschall, *Reagan's Appointments to the U.S. Courts of Appeals: The Continuation of a Judicial Revolution*, 70 JUDICATURE 48 (1986) (examining statistically the decision patterns of judicial appointees from the Kennedy, Johnson, Nixon, Ford, Carter, and Reagan administrations); Note, *All the President's Men?: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766 (1987) (arguing that Reagan-appointed judges are conservative, although not significantly more conservative than mainstream Republicans).

Second, the statistics cannot be understood simply as the Court's "correcting" for the earlier

simply provide an overall confirmation of what the Court's philosophy predicts: the Rehnquist Court is likely to rule in favor of the government in constitutional cases.

D. The Quest for Judicial Neutrality

Ironically, the lack of a consistent theory of constitutional interpretation creates the appearance of arbitrarily imposed judicial values. For example, how can the Court's invalidation of Richmond's affirmative action program[71] be reconciled with its insistence that the Court rule against the government only when guided by clear constitutional principles that exist external to the views of the Justices? By what theory is the requirement that the government be "color-blind" such a principle, but a person's right to be free from a drug test in the absence of individualized suspicion is not?[72] Similarly, why, according to Justice Scalia, did a law prohibiting flag burning violate an objective constitutional principle,[73] but execution of minors or the mentally retarded did not?[74] Despite the Court's expressed desire to avoid judicial value imposition, the apparent methodological irreconcilability of these cases fosters an appearance of judicial value imposition.

There are at least two explanations for this inconsistency. First, the Court's emphasis on judicial deference and neutrality is just a rhetorical gloss to explain its rulings approving government actions that the Court favors. Second, the Court truly seeks neutrality, but lacks a consistent theory and is thus left with an ad hoc and inconsistent method of decisionmaking: the Court sides with the government except when five Justices happen to find "external principles" to do otherwise. Both explanations lead to a need to evaluate critically the Court's premises. Whether the Court's claims of neutrality are rhetoric or the actual basis for decisions, the judicial approach needs to change.

The Court's talk about deference and avoiding judicial value imposition might be just rhetoric that the Court employs when siding with government policies it favors. Because the Court so often agrees with the government's choices, it frequently uses this rhetoric. The Court's inconsistent use of originalism, process and tradition creates the appearance that the Justices follow their preferences and then employ the justification that best supports the results they desire.

---

disproportionate rulings against the government. Although a few rulings overturned or limited prior precedents, most cases involved issues of first impression for the Supreme Court.

[71] *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

[72] *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

[73] *See* Texas v. Johnson, 109 S. Ct. 2533, 2548 (1989).

[74] *See* Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

This account of the Court's behavior is unproductive and indeterminate; lack of access to the Justices' deliberations or thought processes precludes proof that the Court's explanations are just a rhetorical guise. Rather than engage in an argument about the Court's deceptiveness, I prefer to accept the Court's rhetoric and explain why it is insufficient and unpersuasive. If the Court cannot justify its decisions based on this rhetoric, it must defend its rulings on other terms. Ideally, a widespread rejection of its proffered justifications will force the Court to explain and defend its value choices more openly.

Moreover, rhetoric has effects. Even if the emphasis on deference to majority rule and judicial restraint is a guise, it strongly influences thinking and decisionmaking on the Court.[75] Hence, if one believes that the Court's rulings are entirely a product of the Justices' conservative agenda, the appropriate response is to demonstrate the inadequacy of their rhetoric of deference, to expose their value judgments, and to encourage more judicial candor. The remainder of this Foreword considers how the rhetoric of value neutrality and majoritarianism have come to dominate constitutional law, explains why it is a rationale that should not be regarded as persuasive, and discusses how alternative approaches might be constructed.

Alternatively, one might maintain that the Court sincerely seeks judicial neutrality but lacks a way of identifying "objective" constitutional principles and thus usually rules against constitutional claims. However, occasionally, five Justices agree on a sufficiently clear constitutional principle and find a particular government action unconstitutional. At least for now, the Court offers no explanation to separate these few cases from the many more where the government prevails. Last Term provides some support for this account: the Rehnquist Court upheld economic regulations, such as large punitive damage awards and limits on utility profits, that a conservative might disfavor.[76] These cases suggest that the Court's decisions are, in part,

---

[75] Rhetoric takes on a life of its own; it influences and constrains beliefs and behavior. For example, in Griswold v. Connecticut, 381 U.S. 439 (1965), Justice Douglas expressly refused to use substantive due process to find a right to privacy. Criticisms of this doctrine and its association with Lochnerism were still too powerful. Justice Douglas' use of a penumbra of the Bill of Rights to protect privacy, applied to the states through the due process clause of the fourteenth amendment, seems indistinguishable from the substantive due process that he expressly rejected. Likewise, it is doubtful that current members of the Supreme Court will declare that the Constitution forbids abortion because fetuses are "persons" protected by the fourteenth amendment. Such a position would be inconsistent with the way dissenting Justices and scholars have criticized *Roe v. Wade* as unsupported by the text or the framers' intent.

[76] *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989) (rejecting a challenge to punitive damage awards based on the eighth amendment's prohibition against excessive fines, but leaving open the possibility of a due process challenge); Duquesne Light Co. v. Barasch, 109 S. Ct. 609 (1989) (rejecting a challenge to limits on the ability of utilities to

a product of its commitment to judicial neutrality and deference to government decisions.

By either account, the quest for judicial neutrality is extremely important. A successful challenge to its legitimacy will lead the Court to provide a more open justification for its rulings, one that more explicitly identifies and defends its value choices. Alternatively, if the Court's decisionmaking is actually based on the quest for neutrality, revealing the misguided nature of such a quest facilitates the development of theories of constitutional interpretation.

II. How a Majoritarian Paradigm Came To Dominate Constitutional Law

It is tempting to view the Rehnquist Court's decisions, and its approach to judicial review, simply as a product of the conservative views of a majority of the current Justices. Obviously, the decisions frequently do reflect the ideology of the Justices; after all, Justices Brennan, Marshall, and Blackmun frequently dissent in constitutional cases largely due to a judicial and political philosophy that is quite different from that of the conservative majority. Yet, viewing the Court in purely political terms overlooks the many forces that have shaped its approach to constitutional law. To view the Rehnquist Court entirely in ideological terms is to ignore the fact that these forces would confront any Court, liberal or conservative.

The Rehnquist Court's search for judicial neutrality has deep roots in American jurisprudence and constitutional law. It is part of the dominant paradigm of constitutional law and scholarship, a paradigm that emphasizes the democratic roots of the American polity and that characterizes judicial review as at odds with American democracy.[77] This Part reviews the origins and contours of that paradigm; although the several factors are discussed separately, they must be understood as interrelated and mutually reinforcing.

A. The Cycles of Rhetoric and Politics

The Court's quest for neutrality and deference to majoritarian decisionmaking should be understood to have partially resulted from

---

recover capital investments). However, earlier decisions by the Rehnquist Court revealed a greater willingness to rule against the government on claims under the takings clause of the fifth amendment. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[77] Throughout the remainder of this Foreword, this view will be labeled the "majoritarian paradigm." This phrase refers to the philosophy, described in this Part, that American democracy means majority rule; that the legislatures and executives are majoritarian, but the Court is counter-majoritarian; and that as a result, the Court should invalidate government actions only when they violate clear constitutional principles that exist apart from the preferences of the Justices.

rhetorical forces. Criticism of the Court throughout American history has shaped beliefs about the proper role of the judiciary and in turn shaped its jurisprudence. Not surprisingly, those who disagree with Supreme Court decisions often have articulated their criticism in terms of the anti-democratic nature of judicial review. Judicial invalidation of legislation appears anti-majoritarian, and arguments appealing to democratic values always have had great power in American society. Moreover, it is often easier to criticize a decision as usurping democracy than it is to debate the substantive desirability of the ruling. If nothing else, it permits appeal to a commonly shared ideal of democratic rule, whereas arguments on substantive grounds highlight disagreements over values.

Because of political power shifts, those who criticize the Supreme Court often come to control it. Progressives who attacked the *Lochner* Court dominated the judiciary by the late 1930's and conservatives who opposed Warren Court rulings subsequently controlled the Court. In each instance, the new Justices needed to define a method of judicial review that was consistent with their earlier criticisms of the Court. These cycles of politics and rhetoric created increasing pressure for judicial review without judicial value imposition and for judicial deference to the decisions of the elected branches of government.[78]

The Supreme Court's invalidation of progressive economic and social legislation during the *Lochner* era was strongly criticized as anti-democratic. Legal scholarship, perhaps beginning with James Bradley Thayer's famous article in 1893,[79] emphasized the undesirable anti-democratic nature of judicial review.[80] Legal scholars maintained that the Court was functioning as a "super-legislature" and questioned the legitimacy of judicial review.[81] Dissenting Justices on the Supreme Court also stressed the anti-democratic effects of the Court's rulings.[82]

---

[78] By this account, criticism of the Court for being excessively deferential should subsequently have an effect when these critics control the Court. Thus far in American history, however, the attack on the Court for usurping democracy has been far more prevalent and powerful than the attack for excessive deference. Sustained criticism of the Rehnquist Court's deferential jurisprudence might produce a future Court that more aggressively protects individual rights, equal protection, and the structure of American government.

[79] Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[80] *See* Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 61 (1987) (stating that, starting with Thayer in 1893, "the progressives developed the view that . . . judicial review [was] undemocratic"). Thayer contended that commitment to democratic rule meant that the judiciary should invalidate legislation only when "those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question." Thayer, *supra* note 79, at 144.

[81] *See, e.g.*, C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 425 (1959); Frankfurter, *The Red Terror of Judicial Reform*, 40 NEW REPUBLIC 110 (1924).

[82] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting) (arguing

In the 1930's, economic pressures from the Depression, political opposition by the Roosevelt Administration, and intellectual assaults by the Legal Realists highlighted the anti-majoritarian character of judicial review. The Supreme Court's invalidation of popular New Deal legislation[83] made it especially vulnerable to such criticisms. By the late 1930's, the new Justices had to define a role for the judiciary that did not offend their earlier criticisms of the *Lochner* era Court.[84] This was not simply a matter of appearance or strategy; a strong consensus existed that the previous Court had acted improperly in striking down needed social and economic legislation. In fact, since the mid-1930's, discussions about constitutional law have been dominated by a desire to devise a role for the Supreme Court that avoids the evils of Lochnerism.[85]

From 1937 until 1954, the Court rarely invalidated government actions, at least partially in response to the tremendous pressure toward deference created by the attacks on the *Lochner* era Court. The Roosevelt appointees to the bench likely began with a philosophy of approving government actions in response to the many invalidations that had preceded them.[86]

Once the Court began to declare laws unconstitutional more frequently with the advent of the Warren Court, the criticism of judicial review as undemocratic resurfaced. After the Supreme Court's ruling in *Brown v. Board of Education*,[87] for example, ninety-six Southern congressmen issued a declaration calling *Brown* a "clear abuse of the judicial power" in which the "Federal judiciary [was] undertaking to legislate in derogation of the authority of Congress."[88] This type of

---

against "bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several states when exerting their conceded power to guard the health and safety of their citizens").

[83] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[84] *See* Shapiro, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T, *supra* note 11, at 218, 220.

[85] See L. TRIBE, *supra* note 22, § 8-7, at 584 (arguing that constitutional scholarship has been "preoccupied (one could say obsessed)" with defining a role for the Court after the decline of Lochnerism).

[86] As discussed below, the famous *Carolene Products* footnote, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938), was the hallmark of this pro-government position because it was grounded in a strong assumption of legislative superiority. *See* Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979) (noting that the *Carolene Products* footnote reflected the Progressives' triumph and "posited the supremacy of the legislature. The role of the courts, even on constitutional questions, was defined in terms of 'legislative failure.'"); *see also infra* pp. 68–69.

[87] 347 U.S. 483 (1954).

[88] *See* N.Y. Times, Mar. 12, 1956, at 19, col. 2 (printing the "Declaration of Constitutional Principles" issued by Southern congressmen).

argument dominated criticism of Court decisions during the 1960's and 1970's. Controversial rulings, such as those outlawing school prayer and protecting a right to abortion, were attacked as value imposition by the judiciary.[89] Dissenters on the Court often argued that the Court, guided by the personal preferences of the Justices in the majority, illegitimately displaced democratic decisions.[90]

Taken together, these events illustrate the process of rhetoric and political history. Those who disagree with the Court frequently have criticized judicial decisions as anti-majoritarian. When the critics gain control, they tend to abide by their critical rhetoric and to devise a method of judicial review that comports with their earlier attacks on the Court. The approach to judicial review of the Court's current conservative majority is generally consistent with the criticisms that conservatives had directed at more liberal Warren and Burger Court *rulings*. The current Justices profess a desire to avoid overturning legislative or executive decisions based on their personal preferences and generally rule in favor of the elected branches of government.[91] In this way, the cycles of rhetoric and politics have been a strong force for a paradigm of judging that emphasizes judicial neutrality and deference to majoritarian decisionmaking.

B. Constitutional Jurisprudence

The majoritarian paradigm that has come to dominate constitutional theory is in part the result of jurisprudential trends. During this century, a definition of democracy as majority rule has emerged and a belief in natural rights as the basis for judicial review has been rejected — trends that create strong forces for judicial deference. Moreover, most constitutional scholars have defined their task as developing a method of judicial review that is consistent with majority rule and that avoids judicial value imposition. For more than a decade, many constitutional scholars have attempted to reconcile judicial review with majority rule. These trends have informed the majoritarian paradigm — of which the Rehnquist Court's approach to judicial review is but the latest manifestation.

1. History. — In part, the current Court's approach to judicial review stems from two historical forces: the demise of natural rights theory in constitutional decisionmaking and a shift in the concept of

---

[89] *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 926 (1973) (questioning whether the Court should "get into the business of second-guessing legislative balances"); Pfeffer, *Court, Constitution, and Prayer*, 16 RUTGERS L. REV. 735, 735 (1962); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25, 40–41 (1962) (arguing that Court should have exercised judicial restraint in school prayer decision).

[90] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 511–13, 511 n.4 (1964) (Black, J., dissenting).

[91] *See supra* p. 49.

democracy. Rejection by the Court and most commentators of natural law precepts created strong pressure for the Court to leave value choices to the elected branches of government. Moreover, as democracy increasingly came to mean majority rule, the specter of judicial governance grew more troubling.

These two stories — the dominance of majoritarianism in American democracy and the decline of natural rights theories — are familiar and intertwined tales. The framers' distrust of majoritarian politics is well documented.[92] As Charles Beard remarked, "majority rule was undoubtedly more odious to most of the delegates to the Convention than was slavery."[93] The design of government institutions reflects their distrust of majority rule. Under the original Constitution, the President was chosen by the electoral college, the Senate was comprised of two Senators elected by each state legislature, and the federal judiciary was selected by the President, was approved by the Senate, and was assured life tenure. Although the right of the people to issue binding instructions to representatives was common until the 1780's and was originally included in the proposed amendments that constituted the Bill of Rights, James Madison and Alexander Hamilton led the fight against such mandates.[94] They argued that representatives should exercise independent judgment and not be bound to follow the preferences of the voters. Elected officials were to deliberate and follow their consciences, not slavishly obey public sentiment.[95]

In addition to distrusting majority rule, the framers believed that individuals possess natural rights.[96] For the first century and a half of American constitutional law, the Supreme Court acted from an often expressed belief that certain rights existed before the Constitution, were embodied in the Constitution, and were to be protected by the judiciary from majoritarian interference.[97] Believing that natural

---

[92] *See, e.g.*, THE FEDERALIST No. 9, at 72–73 (A. Hamilton) (C. Rossiter ed. 1961); *id.* No. 10, at 78–84 (J. Madison); *id.* No. 14, at 100–01 (J. Madison); *id.* No. 55, at 341–42 (J. Madison); *see also* Lobel, *The Meaning of Democracy: Representative and Participatory Democracy in the New Nicaraguan Constitution*, 49 U. PITT. L. REV. 823, 827–28 (1988) (quoting Edmund Randolph lamenting the "follies of democracy"; Eldridge Gerry labeling democracy "the worst of all political evils"; and Roger Sherman praying that the people "have as little to do as may be about the government").

[93] DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL 29 (C. Beard & B. Shultz eds. 1912).

[94] *See* T. CRONIN, DIRECT DEMOCRACY 24–26 (1989).

[95] *See id.*

[96] *See, e.g.*, C. MULLETT, FUNDAMENTAL LAW AND THE AMERICAN REVOLUTION 1760–1776 (1933); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152 (1928); Sherry, *The Framers' Unwritten Constitution*, 54 U. CHI. L. REV. 1127, 1130, 1134 (1987).

[97] *See, e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139, 143 (1810); Loan Ass'n v. Topeka,

rights limited the permissible scope of legislation, the Court appeared untroubled by the counter-majoritarian nature of judicial review. The Court strove to discover and enforce natural rights.[98] The Supreme Court's decisionmaking in the *Lochner* era continued this natural rights philosophy.[99] Although belief in natural rights waned in many areas of the law by the early twentieth century, the Supreme Court continued to hold and act on such a philosophy. The Court considered economic liberties such as freedom of contract and ownership of property as natural rights embodied in the Constitution.[100] The opinions during this period did not include lengthy discussions about the role of the Court in a democratic society or even detailed explanations for why the protected rights were deemed fundamental. To the contrary, the Court merely announced and protected rights such as freedom of contract and the authority of parents to control the upbringing of their children.[101]

After a protracted intellectual battle, the Legal Realists' attack on natural rights jurisprudence succeeded and a belief in natural rights no longer dominated the Court's approach to constitutional law.[102]

---

87 U.S. (20 Wall.) 655, 662–63 (1874); *see also* Sherry, *supra* note 96, at 1134 (discussing eighteenth-century decisions that acknowledge some higher natural law).

[98] *See* C. MAY, IN THE NAME OF WAR: JUDICIAL REVIEW AND WAR POWERS SINCE 1908, at 6 (1989) ("For nearly a century this 'anti-majoritarian difficulty' had been resolved by the notion that judges did not make law but merely discerned preexisting rules, which were applied to the case at hand.").

[99] *See* Horwitz, *supra* note 80, at 59. Viewing Lochnerism as a continuation of, rather than a departure from, Supreme Court jurisprudence raises the interesting question of why the Court began aggressively striking down government actions in the late nineteenth and early twentieth centuries. Increased government activity provides one partial explanation. Professor Nelson's research on antislavery jurisprudence suggests another possible explanation. He argues that opposition to slavery intensified belief in natural rights doctrines, which countered the growing dominance of the instrumental style of reasoning. *See* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 525–32 (1974).

[100] *See, e.g.*, Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 804 (1989) (arguing that "in the Lochnerian view . . . [contract and property rights] existed outside the Constitution. They *pre-existed* the Constitution." (emphasis in original)); Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987) (discussing the judicial view of common law rights as natural rather than created).

[101] *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (protecting the right of parents to instruct their children in foreign languages); Coppage v. Kansas, 236 U.S. 1, 14, 23 (1915) (protecting the right to contract); Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897) (protecting the right to do business in the state); Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 765 (1884) (protecting the right to pursue a chosen profession).

[102] *See, e.g.*, Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 744 (1922); Freund, *Limitation of Hours Labor and the Federal Supreme Court*, 17 GREEN BAG 411 (1905); *see also* L. TRIBE, *supra* note 22, § 8-6, at 578 (describing the Legal Realists' attack on natural law principles); E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 11, 74–94 (1973) (describing the intellectual battle over Legal Realism and the effect of the Legal Realists' scientific naturalism criticism). Justice Holmes often criti-

Legal rules, such as those protecting contract and property rights, were viewed as choices, not preexisting truths.[103] The Supreme Court's decision in *Erie Railroad Co. v. Tompkins*,[104] which overruled a century-old precedent, *Swift v. Tyson*,[105] and held that federal courts were to apply state law in diversity cases, provides a good example of this conceptual shift. *Swift* had rested, in part, on an explicitly stated belief in naturally true common law principles that federal courts were to apply.[106] As Justice Frankfurter stated, *Erie* overruled not just a "venerable case," but "a particular way of looking at law, . . . [in which] [l]aw was conceived as a 'brooding omnipresence' of Reason."[107]

At the same time that belief in natural law was challenged and then waned, the prevailing concept of American democracy changed. During the Progressive era, democracy predominately connoted majority rule.[108] The franchise was expanded and many states adopted provisions for ballot initiatives and referenda.[109] Over time, a pluralist definition of democracy emerged. Democracy was seen as a process in which competing interests battle in the legislative process and at the polls[110] to formulate public policy.[111] In fact, majoritarian decisionmaking became an end in itself. If values do not derive from natural law or a shared sense of the public good, they are subjective choices whose makers lack any mechanism for declaring some "true"

---

cized natural rights jurisprudence in his opinions and writings. *See, e.g.*, Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918) ("The jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.").

[103] *See* E. PURCELL, *supra* note 102, at 209 (discussing the triumph of relativism); L. TRIBE, *supra* note 22, § 1-4, at 7.

[104] 304 U.S. 64 (1938).

[105] 41 U.S. (16 Pet.) 1 (1842).

[106] *See id.* at 2 (stating that the "true interpretation and effect . . . are to be sought not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence").

[107] Guaranty Trust Co. v. York, 326 U.S. 99, 101–02 (1945).

[108] *See, e.g.*, R. HOFSTADTER, THE AGE OF REFORM (1955) (discussing Progressive era populism and emphasis on majoritarian decisionmaking); THE PROGRESSIVES (C. Resek ed. 1967). Of course, the Progressive era was not the first in American history to define democracy in very majoritarian terms. In the early nineteenth century, Andrew Jackson led a movement for populist democracy. *See* Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790–1860*, 120 U. PA. L. REV. 1166 (1972).

[109] *See* T. CRONIN, *supra* note 94, at 56–59.

[110] *See, e.g.*, Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 884 (1987) (describing the pluralistic interpretation of the legislative process).

[111] *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY 128, 133–34 (1956) (discussing the "diversity of the minorities whose preferences will influence" the political process in democracy); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 32 (1985) (defining a pluralist conception of the political process).

and others "false." Majority rule — democratic decisionmaking by electorally accountable officials that reflects the preferences of a majority of the citizens — was defended as both intrinsically and instrumentally desirable.[112]

These two trends — the shift away from natural law and the increasing influence of majority rule — made judicial invalidation of government actions highly suspect. If courts cannot discern true values, because none exist, and if majoritarian decisionmaking is the ideal, judicial review is nothing but the substitution by unelected judges of their values for those of popularly elected legislatures.[113] Moreover, judicial review increasingly appeared merely to replicate the legislative task of balancing competing interests.[114]

The famous *Carolene Products* footnote, soon after the end of Lochnerism, offered a way to define the judicial role that seemed consistent with a commitment to majoritarian democracy.[115] The *Carolene Products* approach assumed the supremacy of the elected branches of government and of limited judicial review. The judiciary'stask was to facilitate effective democratic decisionmaking by ensuring full participation and preventing incumbents from frustrating electoral accountability.[116] The Justices would not be substituting their values for that of the legislature;[117] laws would be invalidated

---

[112] The rejection of natural rights was criticized as leading to a value relativism that was at best incoherent because it provided no basis for identifying the desirability of democratic decisionmaking, and at worst amoral because it lacked a foundation for criticizing even Nazism. *See* Brest, *Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 180 n.16 (1986) (discussing the incoherence of value relativism in terms of its inability to justify the value of democracy). Democratic decisionmaking was defended as the solution to this criticism. *See* E. PURCELL, *supra* note 102, at 218–31; Peller, *Neutral Principles in the 1980's*, 21 U. MICH. J.L. REF. 561 (1988).

[113] *See, e.g.*, Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 395 (1985) (discussing the difficulty of defending judicial review in the absence of a natural law philosophy). Moreover, pluralistic theories of democracy led to a philosophy of judicial deference to government decisionmaking. *See, e.g.*, Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1013 n.31 (1987) (noting that theories of pluralism usually implied a "passive judicial stance"); Sunstein, *supra* note 100, at 905 (describing how a pluralistic theory of self-interested behavior implies that "courts should uphold legislation except in the most extreme cases").

[114] *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987).

[115] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *cf.* Ackerman, *supra* note 47, at 715 (arguing that "by demonstrating that the legislative decision itself resulted from an undemocratic procedure, a *Carolene* court hopes to reverse the spin of the countermajoritarian difficulty").

[116] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 103.

[117] Professor Lusky, who as a law clerk to Justice Stone participated in the drafting of the footnote, recalled that Stone "had trumpeted a call for ungrudging acceptance of the legislative judgment." Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1095 (1982). *See also* Ackerman, *supra* note 47, at 715 (stating that, in response to the counter-majoritarian dilemma, "[t]he *Carolene* solution is to seize the high ground of democratic

only if they violated rights specified in the text of the Constitution or disadvantaged "discrete and insular" minorities that could not protect themselves in the pluralistic political process.[118] The allure of the *Carolene Products* approach was great: it was a philosophy that promised both the judicial deference needed to sustain economic regulations and a role for the courts that was consistent with democratic rule.

The *Carolene Products* philosophy of judicial review accepted the premises that democracy means majority rule and that a democratic society cannot accept value imposition by judges. On many occasions during the 1940's and 1950's, the Court reaffirmed its acceptance of these axioms.[119] In fact, "legal process" theorists, who very much dominated American jurisprudence during the 1950's, emphasized the need for the Court to base decisions on "neutral principles" independent of the preferences of the individual Justices.[120] These scholars strove to define a role for the Court that kept it from functioning as a "naked power organ" and that made judicial review consistent with democracy.[121]

By the 1960's and 1970's, however, many came to believe that the *Carolene Products* approach to judicial review did not succeed in its objective of value neutrality and that it inadequately explained the Court's decisions protecting nontextual fundamental rights.[122] Critics argued that applying *Carolene Products* inescapably forced the Court to make value judgments about who is a "discrete and insular" minority and what types of government discrimination are impermissible.[123] Nor could the Warren Court's protection of fundamental rights, such as privacy and travel, be explained as improving the functioning of the democratic process.[124] Those who applauded such

---

theory"); Fiss, *supra* note 86, at 6 (describing the *Carolene Products* footnote as positing that the courts should defer to the elected branches).

[118] *See, e.g.*, Seidman, *supra* note 113, at 1034–35.

[119] *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in the judgment) (stating that decisions must not be based on judges' "personal preference[s]"); American Fed'n of Labor v. American Sash & Door Co., 335 U.S. 538 (1949).

[120] *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

[121] *See id.* at 12.

[122] For an excellent critical discussion of the continued appeal of process-based theories, see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). For examples of criticism of the *Carolene Products* approach, see Ackerman, cited above in note 47; Brilmayer, Carolene, *Conflicts, and the Fate of the "Inside-Outsider,"* 134 U. PA. L. REV. 1291 (1986); and Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 428.

[123] *See, e.g.*, Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745, 756 (1987); Powell, Carolene Products *Revisited*, 82 COLUM. L. REV. 1087, 1090 (1982); Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1314 (1979).

[124] *See, e.g.*, Seidman, *supra* note 113, at 1041 (arguing that *Carolene Products* "simply fails

rights needed to find another way to defend them; those who criticized the Court's actions maintained that the Justices had impermissibly usurped majority rule. The Court's decision in *Roe v. Wade*[125] to protect a right to abortion was especially criticized on this basis and is credited with triggering an intensive debate about the role of the judiciary and the proper method of constitutional interpretation.[126]

Although most would agree that the Court should protect some fundamental rights, there is no consensus as to how to identify such rights.[127] Most of the Court's constitutional decisions protecting individual liberties cannot be justified on the basis of the Constitution's text or the framers' intent. Virtually all judicial protection of individual liberties involves at least some degree of value selection by unelected judges.[128] This appears inconsistent with the commitment to majoritarian democracy that triumphed over Lochnerism. Thus, the definition of democracy as majority rule and the demise of natural law jurisprudence in constitutional law has created an emphasis on judicial deference to government decisions and has caused great uncertainty as to the role of the judiciary.

2. Contemporary Constitutional Theory. — The dominant majoritarian paradigm is also reinforced by constitutional theory and scholarship. Although many scholars attempted to show how constitutional interpretation can proceed in a manner that avoids judicial value imposition and improper interference with democratic decisionmaking, each theory failed in these objectives. This scholarly enterprise, however, has validated the majoritarian paradigm and has legitimated judicial opinions that reject constitutional claims based on the need for judicial neutrality.

While discussions about judicial review and the Supreme Court's role have occurred throughout American history, much of the recent literature has been shaped by Alexander Bickel's *The Least Dangerous Branch*. Bickel argued that judicial review is anti-democratic in that unelected judges invalidate the decisions of popularly elected officials.

---

to describe what has been going on" in decisions about family values and reproductive autonomy); Tribe, *supra* note 122, at 1067 (arguing that the Constitution protects fundamental rights not accounted for in process theory).

[125] 410 U.S. 113 (1973).

[126] *Cf.* Meeks, *Symposium: Judicial Review Versus Democracy — Foreword*, 42 OHIO ST. L.J. 1, 2 (1981) (stating that "the current interest in judicial review can be traced rather directly to *Roe v. Wade*").

[127] *See, e.g.*, Collins & Skover, *supra* note 70, at 230 ("[T]here appears to be no consensus among current individual rights scholars about the appropriate theory for deciphering fundamental legal values."); Shapiro, *supra* note 84, at 224 ("The crisis is simply that mid-twentieth-century Western culture has no commonly agreed upon moral philosophy from which a set of nonsubjective constitutional values can be deduced.").

[128] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 43–72.

This problem, termed the "counter-majoritarian difficulty,"[129] made judicial review a "deviant institution in the American democracy."[130]

Bickel defined "democracy" as majority-rule — decisionmaking by electorally accountable officials. However, this is not the only possible way, nor necessarily the preferable way, to define democracy. Political science theorists disagree greatly about what "democracy" means, and no one theory can claim axiomatic status.[131] For example, many political scientists define democracy as including protection of substantive values, such as freedom of speech and equality.[132]

Most constitutional scholars for the past quarter-century have accepted Bickel's definition of the problem and have seen the task of constitutional theory as defining a role for the Court that is consistent with majoritarian principles. Bickel's "counter-majoritarian difficulty" set the terms for the contemporary debate over judicial review.[133] Books by Jesse Choper, John Ely, and Michael Perry — among the most influential works of constitutional theory in this decade — each begin by expressly endorsing this majoritarian paradigm.

For example, Dean Choper noted that the procedure of judicial review conflicts with the fundamental principle of democracy — majority rule under conditions of political freedom.[134] Similarly, Professor Ely based his analysis on the premise that majority rule "is the core of the American governmental system" and defined his task as describing a judicial rule consistent with this definition of democracy.[135] Professor Perry also began his book by observing that democracy means that decisions among competing values "ought to be subject to control by persons accountable to the electorate."[136]

---

[129] A. BICKEL, THE LEAST DANGEROUS BRANCH 16 (2d ed. 1986).

[130] *Id.* at 18.

[131] *See* M. EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION 5 (1984); *see also* M. PERRY, MORALITY, POLITICS, AND LAW 165 (1988) ("Any particular conception of democracy . . . must be defended.").

[132] *See, e.g.*, R. DAHL, *supra* note 111; H. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY (1960).

[133] *See* Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1013–16 (1984) (describing the counter-majoritarian difficulty as the "starting point" for analysis of judicial review); Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493, 506 (1989) ("[Bickel] set the terms of the contemporary debate over the justification of judicial review, a debate which has changed little in the twenty-five years since Bickel wrote.").

[134] *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4–6 (1980).

[135] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 7–9.

[136] M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 9 (1982). However, in a recent book Professor Perry has modified this position and indicated that majority rule is one component of a proper definition of democracy, but not necessarily the sole or most important part. *See* M. PERRY, MORALITY, POLITICS, AND LAW, *supra* note 131, at 164 ("Although the value of electorally accountable policymaking *is* axiomatic in American political-legal culture, it is *not* axiomatic that value is lexically prior to all other values." (emphasis in original)).

Moreover, the academic literature repeatedly states that judicial decisions must be based on principles external to the values of the Justices.[137] Scholars have emphasized the need for "objective" standards for constitutional decisions — that is, decisions that are not based on the views of the individuals on the Court.[138] Robert Bork, for example, declared that a "Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."[139] John Ely argued that the Court should focus almost exclusively on perfecting the process of government and essentially abandon the protection of fundamental rights because such judicial protection inevitably involves judicial value imposition that is impermissible in a democratic society.[140]

Thus, much of constitutional theory throughout this decade has attempted to develop a framework for judicial review that reconciles Court decisions with majority rule and allows judges to decide cases without imposing their personal values. Although a number of theories have been offered as solutions to Bickel's counter-majoritarian dilemma, each has been extensively criticized as failing at that task.[141] In short, much of constitutional theory has accepted the majoritarian paradigm but has not provided a widely accepted answer as to how to reconcile judicial review with majoritarianism. Thus, constitutional theory has contributed intellectual force to the dominant majoritarian paradigm. As Professor Rostow explained more than thirty-five years ago, even before the contemporary debate about judicial review:

> The idea that judicial review is undemocratic is not an academic issue of political philosophy. Like most abstractions, it has far-reaching practical consequences. I suspect that for some judges it is the mainspring of decision, inducing them in many cases to uphold legislative and executive action which would otherwise have been condemned.[142]

---

[137] *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 44–48; Aleinikoff, *supra* note 114, at 973; Griffin, *supra* note 133, at 504; Maltz, *Individual Rights and State Autonomy*, 12 HARV. J.L. & PUB. POL'Y 163, 165 (1989).

[138] *See* Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 445 (1984) ("Concern that there be 'objective' bases for judicial decisions has long been prominent in American jurisprudence.").

[139] Bork, *supra* note 30, at 6.

[140] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 44–48; Berger, *Ely's 'Theory of Judicial Review,'* 42 OHIO ST. L.J. 87 (1981).

[141] For a review of the voluminous literature analyzing both of these theories, see E. CHEMERINSKY, INTERPRETING THE CONSTITUTION 12–17, 45–80 (1987).

[142] Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 194 (1952).

C. Constitutional Doctrines

The majoritarian paradigm has been shaped not only by history and by constitutional scholarship, but by constitutional doctrine itself. The Court has in effect internalized and institutionalized the majoritarian paradigm, the idea that judicial review — in particular, judicial value imposition — is in tension with American democracy.

Nowhere is this internalization more clear than in the familiar "tiered jurisprudence" employed in fundamental rights and equal protection cases. If a fundamental right or a suspect class is involved, the Court will exercise strict scrutiny, and the government rarely succeeds. If no such interests are present, the Court generally uses a "rational basis" test under which the government almost always wins.[143] This framework creates a strong presumption in favor of rationality review: only in exceptional circumstances — if there is a fundamental right or a suspect classification — does the Court apply heightened scrutiny. These levels of scrutiny allow the Court to justify rulings in favor of the government with little analysis of the competing constitutional interests. To explain a denial of a constitutional claim, the Court need only state why the interest involved warrants analysis under the rational basis test; that is, why the matter does not rise to the level of a fundamental right or a suspect classification. Since these are viewed as quite limited categories, the Court can conclude with relatively minimal reasoning why new interests do not meet the high threshold. The Court then can summarily explain why the government action is rationally related to a legitimate government purpose.

An alternative analytical framework, such as the "sliding scale" proposed by some Justices, would require much more judicial discussion of the competing interests and the basis for the Court's holding.[144] For example, when the Court rejected claims that government age discrimination violated the equal protection clause, the opinions explained that compared to racial minorities, the elderly possess more

---

[143] *See* L. TRIBE, *supra* note 22, § 16-2, at 1440 (discussing "extreme deference" of rationality review). For examples of such deferential review, see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980); Allied Stores v. Bowers, 358 U.S. 522 (1959); Williamson v. Lee Optical, 348 U.S. 483 (1955); and Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952). For notable exceptions, where laws were declared unconstitutional under the rational basis test, see City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985); Zobel v. Williams, 457 U.S. 55 (1982); and United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

[144] *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109–10 (1973) (Marshall, J., dissenting); *see also* Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17–18 (1972) (discussing Justice Marshall's endorsement of a sliding scale); Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 164 (1984) (same).

political power and have not been historically disadvantaged.[145] Concluding that rationality review was warranted, the Court easily held for the government. If the Court had been required to analyze factors such as the constitutional and social importance of the interest adversely affected and the invidiousness of the basis on which the classification was drawn, its conclusion might have been different and, at the very least, its explanation would have been more enlightening.

Similarly, in *Bowers v. Hardwick*, the Court concluded that private consensual adult homosexual activity was not a fundamental right because it was unsupported by the Constitution's text or a tradition of legal protection.[146] Hence, the Court said that the Georgia sodomy statute needed to meet only the very deferential rational basis test. The Court's ability to reject the constitutional claim simply by placing it in the rationality tier illustrates how the levels of scrutiny facilitate deferential judicial review. Implicit in — and reinforced by — all of these doctrines are the majoritarian tenets that majority rule is the baseline and judicial review the exception that needs justification.

III. THE INFIRMITIES OF THE MAJORITARIAN PARADIGM

Despite its pervasiveness and dominance, the majoritarian paradigm suffers from several critical weaknesses. First, the paradigm implicitly relies upon faulty premises about the priority of democracy in the constitutional polity and the differences among the branches of government. More importantly, the paradigm wrongly directs attention away from crucial issues of constitutional law and often disguises critical questions of values as simplistic issues about institutions.

A. The False Priority of Majoritarianism

The majoritarian paradigm is premised in part on the belief that democracy is the essence of the American constitutional order. Current analysis generally assumes a baseline of majority rule and interprets the Constitution and the Supreme Court in this context. This emphasis on majoritarianism makes the Court a "deviant institution" in American society. Yet the Constitution — the basic charter for government in this country — does not support the priority of democracy. As mentioned earlier, the framers openly and explicitly distrusted majority rule; virtually every government institution they

---

[145] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313–14 (1976).

[146] 478 U.S. 186, 190–95 (1986).

created had strong anti-majoritarian features.[147] Even more importantly, the Constitution exists primarily to shield some matters from easy change by political majorities. The body of the Constitution reflects a commitment to separation of powers and individual liberties (for example, no ex post facto laws or bills of attainder, no state impairment of the obligation of contracts, no congressional suspension of the writ of habeas corpus except in times of insurrection). Furthermore, as Justice Jackson eloquently stated:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote: they depend on the outcome of no elections.[148]

If judicial review is always slightly suspect because it is not expressly mentioned in the Constitution's text, majority rule should be even more so because the Constitution seems so heavily oriented against it. Taking the Constitution as the baseline in understanding American government and in determining the place of majority rule avoids such an anomaly. Judicial review implementing a counter-majoritarian document is inherently counter-majoritarian; but such court review is not deviant if the Constitution's values are the major premise in analysis.

Furthermore, majority rule is not normatively superior to other values. Democracy is valued, in large part, as a means to ensure values such as individual autonomy (the importance of each individual having a say in how he or she is governed) and equality (the need for all to have a potentially equal ability to determine the government).[149] Because majority rule is instrumental, it should not be regarded as superior to those values it serves. Instead, core constitutional norms such as autonomy and equality are part of the constitutional order

---

[147] The *Federalist Papers*, for example, repeatedly emphasize the dangers of unchecked majoritarianism. *See, e.g.*, THE FEDERALIST No. 10, at 78–84 (J. Madison) (C. Rossiter ed. 1961); *id.* No. 49, at 315–17 (J. Madison). I am not, however, making an originalist argument that majority rule should be rejected as the dominant premise because the framers rejected it. My point is a more limited one: majority rule cannot claim axiomatic, authoritative status as the starting point for constitutional analysis. But those (including members of the Court) who profess both an originalist philosophy and a commitment to majority rule (and originalists seem frequently to express both views) are caught in a contradiction.

[148] West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

[149] *See* M. SHAPIRO & R. SPECE, CASES, MATERIALS AND PROBLEMS ON BIOETHICS AND LAW 40 (1981) (noting that democratic principles are "grounded on values of autonomy and equality"); Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1567 n.48 (1988) (defining autonomy).

and both majority rule and judicial review are means of achieving these ends.

To clarify analysis and arguments, "democracy" should be redefined. Analytically, altering the definition of democracy is unnecessary because the flaw is not in defining democracy as majority rule, but rather, in making majority rule the primary premise. A defense of judicial activism requires a reconceptualization of the premises that view majority rule as superior to other constitutional values. This certainly could be done without worrying about how democracy is defined.

However, democracy is an incredibly powerful term in this society; it will be used repeatedly and always will be taken by many as the major premise in analysis. As such, the best approach insists that the term include both substantive constitutional values as well as the procedural norm of majority rule.[150] Nor is this broader definition of democracy without precedent; in fact, it accords with the analysis of most political science theorists.[151] In essence, there are two choices: abandon the term democracy as the major premise in analysis or redefine it to portray accurately the nature of government embodied in the Constitution. Because the former is improbable, the latter is essential.

Altering the definition of democracy has important implications in determining a role for the Supreme Court and ascertaining the proper approach to judicial review. First, judicial review enhances democracy because it safeguards the substantive values that are part of democratic rule.[152] Just as John Ely argued that judicial review is democratic when it reinforces majority rule,[153] judicial review is democratic when it reinforces the fundamental rights that are part of American democracy. This is not to say that the counter-majoritarian dilemma is solved. An inherent tension exists between the procedural and substantive components of democracy. However, there is a major analytical difference between seeing the counter-majoritarian difficulty as a tension between two values of equal import and viewing it as a

---

[150] *See* A. BARAK, JUDICIAL DISCRETION 195 (1989) ("My argument is that democracy is not one-dimensional. It is not simply majority rule. Democracy is multidimensional. It is the realization of certain fundamental values, such as basic human rights." (footnote omitted)).

[151] *See* M. TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 71 (1988) ("Such a view of democracy has seemed inadequate to most political theorists, who argue that democracy, properly conceived, requires the protection of some fundamental but nonpolitical rights." (footnote omitted)). Of course, the preference of political scientists for a broader definition of democracy does not establish its superiority. The political scientists' view demonstrates only that the definition of democracy as majority rule is not axiomatic and that a broader definition of democracy is not beyond an acceptable use of the term.

[152] *See, e.g.*, *id.* at 196 ("When a judge makes policy in the context of the fundamental values of the democracy, he does not act against the democracy but rather according to it.").

[153] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 101–04.

conflict between the major premise of the American system and the practice of judicial review. If majority rule is no longer considered the dominant premise, no longer should judicial review be regarded as illegitimate until and unless it is reconciled with majority rule. This shift radically alters the enterprise that has dominated much of constitutional theory — making judicial review consistent with majority rule.

Second, the rhetorical force of much of the criticism of the Supreme Court derives from the claim that the judiciary is anti-democratic. It is hard to imagine a more damning criticism of a practice in American society; the charge itself creates a presumption against the practice. Demonstrating that democracy is not synonymous with majority rule and that judicial review is not anti-democratic undermines the rhetorical force of the criticism.

The task necessarily becomes deciding the appropriate content of American democracy — what matters should be decided by majoritarian processes and what values are so important that they should be deemed protected by the Constitution and safeguarded by the judiciary. The concept of majority rule obviously can provide no answer to this question.

B. Allocating Authority Among the Branches

In developing a theory of judicial review, the crucial question is which issues are best suited to legislative, executive, or judicial resolution. The Rehnquist Court appears to answer this question largely by invoking the concept of majority rule. The Court assumes that because legislatures and executives are electorally accountable, while the federal courts are counter-majoritarian, the former are generally preferable as decisionmaking bodies.

This argument is flawed in two ways. First, the usual characterization of executives and legislatures, but not the courts, as majoritarian exaggerates the differences between the institutions and distorts analysis. Second, in allocating decisionmaking authority, the political responsiveness of the branches is only one factor to consider and not necessarily the most important.

1. The Three Branches of Democracy. — The legislature and executive are often characterized as democratic — assuming that decisionmaking in those branches reflects the preferences of a majority of its citizens. Yet, an impressive wealth of economics and political science literature demonstrates that the politically accountable branches do not necessarily act in a way that reflects the majority's views. However, if one defines "democratic" more broadly to reflect the actual nature of decisionmaking, all government institutions are, at least, somewhat "democratic" and indirectly accountable to the voters.

This recognition reveals that majority rule is not a unitary concept, but rather a spectrum with different government arrangements labeled more or less "majoritarian." Although legislatures and courts may occupy different points on this continuum, one institution is not absolutely preferable to another. This choice among institutions is contextually based and thus cannot be made solely on the basis of a single variable of majoritarianism. Once one understands that no branch of government is truly majoritarian, but that all existing institutions further the ends of democracy, judicial review appears much less deviant.

Political science and economics research, especially the public choice literature, has powerfully demonstrated that legislative action frequently does not reflect the sentiments of society's majority for two reasons. First, individual legislators often do not vote in accord with the preferences of a majority of their constituents. Second, the nature of decisionmaking by multi-member bodies makes it unlikely that their decisions will accurately reflect the preferences of a majority of those represented.

There are many reasons why a legislator's vote on any given bill may not parallel the views of a majority of his or her constituents.[154] Interest groups and single issue voters,[155] for example, may greatly influence legislation. Also, a legislator's ideology[156] and personal views may cause the representative to deviate from the wishes of a majority of his or her constituents. Alternatively, political parties may influence voting behavior in legislative bodies,[157] either in individual decisions or in the process of logrolling and building a coalition on

---

[154] No single theory can describe all legislative behavior. As Professors Farber and Frickey explain, "[u]ltimately, contemporary political science research concerning interest groups and legislator behavior suggests a complex political world ill-fitting any simple formula." Farber & Frickey, *supra* note 110, at 890. I am not making the strong claim that the legislative process never reflects majoritarian preferences; rather, I am making a weaker claim that in light of social science research it cannot be assumed that legislative action is majoritarian. The latter sufficiently challenges the uncritical assumption that legislatures and executives are majoritarian, but the judiciary is not.

[155] *See* R. DAHL, *supra* note 111, at 128, 133–34 (arguing that American politics is shaped by the preferences of minority interest groups); M. TUSHNET, *supra* note 151, at 79–80 (illustrating the potential political influence of special interests); Sunstein, *supra* note 111, at 48 ("[T]here is mounting evidence that the pluralist understanding captures a significant component of the legislative process and that, at the descriptive level, it is far superior to its competitors."); *see also* K. SCHLOZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 403 (1986) (characterizing special interest groups as a "minoritarian counterweight" in the political system).

[156] *See* Farber & Frickey, *supra* note 110, at 897 ("[R]esearch indicates that ideology . . . is a better predictor of legislator behavior than economics.").

[157] *See, e.g.*, G. GALLOWAY, HISTORY OF THE HOUSE OF REPRESENTATIVES 161–95 (2d ed. 1976); R. PEABODY, LEADERSHIP IN CONGRESS: STABILITY, SUCCESSION, AND CHANGE 27–65 (1976); Farber & Frickey, *supra* note 110, at 900 n.165.

another matter.[158] Moreover, reduced electoral participation may mean that even if the legislator is following the *voters'* wishes, he or she may still not be acting in accord with the majority in the district.[159]

Many scholars have attempted to model and describe legislative behavior. Their explanations often conflict and the literature suggests that no single account is accurate. I do not seek to make a normative point about the desirability of the legislative process, nor do I deny that sometimes a legislator does vote in accord with the majority of his or her constituents' desires, especially on visible issues that are likely to be used as a litmus test in future elections. But there is significant reason to doubt that legislators necessarily act in accord with a majority of their constituents' views.

Second, even if one assumes that every legislator always sought to vote consistently with the wishes of a majority of his or her constituents, the legislature's overall decision still may not accurately reflect the views of a majority in society. For example, there could be many districts where support for the bill was nearly unanimous, but a larger number of districts where the bill was opposed by a bare majority of the voters. If voters were polled, the majority of society would express support for the proposed legislation. But if each legislator truly voted in accord with the majority of the constituents in his or her district, the bill would be defeated.[160] In the United States Senate, where each state regardless of population has two votes, this effect is magnified as Senators representing states with a minority of the population can frustrate the will of the majority of the citizenry.[161]

Social choice theorists have demonstrated reasons why multi-member bodies cannot accurately aggregate preferences and reflect majority

---

[158] In fact, logrolling and coalition building illustrate the complexities of defining majority rule. Imagine that citizens oppose "proposal A" by a margin of 70–30 and others oppose "proposal B" by a margin of 70–30. Under these circumstances, a bill combining both proposals might actually be favored by a margin of 60–40. It is not entirely clear what is majority rule in that context. *See* R. DAHL, *supra* note 111, at 128.

[159] *See, e.g.*, W. KELSO, AMERICAN DEMOCRATIC THEORY 66–67 (1978); M. TUSHNET, *supra* note 151, at 103 ("Participation in politics is so low as to raise questions about the representativeness of the process as a whole.").

[160] The effect is that legislators representing 25.01% of the population might be able to enact or block legislation, depending on how those favoring or opposing a bill are distributed among districts. (The 25.01% figure assumes that all legislative districts are of equal population and that each representative votes in accord with the wishes of a majority of the population. If in half of the districts plus one, fifty percent of the voters plus one favor a bill, it would pass even if every other citizen opposed the bill. In other words, if 50.01% of the people in 50.01% of the districts favor a bill it would pass, even though the rest of society — almost 75% — opposed it.)

[161] *See* Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 821 (1974) (noting that senators representing less than 15% of the population could potentially enact or block laws).

wishes. The famous Arrow Impossibility Theorem, for example, questions whether "*any* process could even hope to 'reflect' any such thing as the will of the majority."[162] Social choice theorists also have shown that agenda manipulation by strategic players often controls legislative conduct in an anti-majoritarian manner.[163] As Professor Sunstein has noted:

> [A]ccurate preference-aggregation through politics is unlikely to be accomplished in the light of the conundrums in developing a social welfare function. Public choice theory has shown that cycling problems, strategic and manipulative behavior, sheer chance and other factors make majoritarianism highly unlikely to provide an accurate aggregation of preferences.[164]

Nor can it be said that legislatures are majoritarian simply because their members are electorally accountable.[165] At a minimum, the actual degree of electoral accountability is questionable when the overwhelming majority of incumbents win reelection.[166] Moreover, as election campaigns have become increasingly expensive, many candidates have come to depend heavily on money from special interest groups and their political action campaign funds.[167] This dependence

---

[162] L. TRIBE, *supra* note 22, § 1-7, at 12 n.6 (emphasis in original); *see* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); *see also* A. FELDMAN, WELFARE ECONOMICS AND SOCIAL CHOICE THEORY 178–95 (1980) (summarizing Arrow's theorem that no foolproof method for discovering rational preferences exists).

[163] *See, e.g.*, Shepsle & Weingast, *Institutionalizing Majority Rule: A Social Choice Theory With Political Implications*, 72 AM. ECON. REV. 367, 371 (1982) ("Agenda manipulation by strategic players within well-defined contexts is, in our opinion, the central characteristic of legislatures.").

[164] Sunstein, *Constitutions and Democracies: An Epilogue*, in CONSTITUTIONALISM AND DEMOCRACY 327, 335 (J. Elster & R. Slagstad eds. 1988) (citations omitted); *see also* Farber & Frickey, *supra* note 110, at 901–06 (discussing the implications of Arrow's Impossibility Theorem for legislative behavior).

[165] Some theorists define democracy as electorally accountable officials making value choices. *See, e.g.*, M. PERRY, *supra* note 131, at 3–4, 9.

[166] *See* Nelson, *The Effect of Incumbency on Voting in Congressional Elections, 1964–74*, 93 POL. SCI. Q. 665, 665 (1978) (noting that between 1956 and 1976, 94 percent of House members seeking reelection won); Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1373 n.179 (1987) (observing that 98 percent of House incumbents who ran won reelection in 1986). Although the statistics conceivably could be used to argue that legislators consistently vote in accord with the preferences of their constituency, the more likely explanation is that incumbency is a powerful factor that often frustrates electoral accountability.

[167] *See, e.g.*, Briffault, Book Review, 63 TEX. L. REV. 1347, 1361 (1985) ("Private wealth and special interests dominate the financing of candidate elections as well as initiative petition drives and ballot proposition campaigns."); Forrester, *The New Constitutional Right To Buy Elections*, 69 A.B.A. J. 1078, 1080 (1983) (describing the dependence of political candidates on large campaign budgets and the possibility of undue influence of interest groups and PACs); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 815 (1974) (arguing that inherent inequities of financing political campaigns through the large private contributions that have become the mainstay of political financing compels campaign finance reform).

increases the influence of special interest groups in the legislative process and lessens the likelihood that the process reflects the majority's preferences.

Many of the same factors that keep legislatures from acting in a majoritarian fashion apply to executives as well. Executives, too, might be disproportionately influenced by special interest groups, by intensely held preferences of factions, and by single-issue voters. On many issues, executives might not have an accurate impression of majority sentiments or might believe that the issue is not likely to matter to even those voters who disagree with the President's decision. Furthermore, a second-term President or a governor unable to seek reelection is no longer electorally accountable.[168]

Administrative agencies cannot be regarded as majoritarian. Beyond the long-recognized problem of capture,[169] agency officials are not elected and in many instances, statutes limit the power to remove agency heads.[170] The political accountability of the head of an independent regulatory agency greatly resembles that of a federal judge. Neither is selected by the voters or reviewable by them; removal of both is difficult.[171] As Professor Wellington observed, "governmental decisions of vast importance and great moment are made daily by appointed officials through processes that are neither responsive nor responsible in any direct way to majority will."[172]

It is incorrect to characterize the legislature and executive as majoritarian but the judiciary as counter-majoritarian — a correct depiction is far more subtle and complicated.[173] The usual response by

---

[168] *See* Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1085 (1988) ("If reelectability is the democratic touchstone, a second term President is no different from federal judges.").

[169] *See generally* Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

[170] *See* Morrison v. Olson, 108 S. Ct. 2597 (1988) (holding that the Ethics in Government Act, which restricts the Attorney General's power to remove the independent counsel only to cases in which the Attorney General can show good cause, does not impermissibly interfere with the President's exercise of executive authority); Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (approving statutory limits on the President's power to remove FTC commissioners); Blumoff, *Illusions of Constitutional Decision-Making: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1117–26 (1988) (discussing Congress' power to condition removability of civil officers).

[171] Although impeachment of a federal judge requires a more burdensome showing than the "cause" needed to remove a commissioner of a federal independent agency, neither event occurs with any frequency.

[172] Wellington, *Foreword* to A. BICKEL, *supra* note 129, at xi.

[173] The legislature and the executive might be defined as majoritarian not because they reflect the majority's preferences, but rather because they receive constant "inputs" from society in the form of votes and constituents' letters. Here, too, it is not clear that the legislature and the executive are substantially more majoritarian than the courts. The judiciary hears from society in the form of amicus briefs, intervenors, and arguments raised by the parties. Moreover, judges live in the society and therefore are generally familiar with the views and concerns of citizens. In fact, the potential for special interest groups to drown out other voices in the legislative or

constitutional theorists that none of this matters because the judiciary is still less majoritarian than the other branches of government[174] misses the point.

If majority rule is defined as government decisions accurately reflecting the preferences of the citizens, there is reason to doubt whether any government institution is majoritarian. Thus, a more realistic definition of majority rule is needed and a wide variety of forms of electoral accountability and popular responsiveness can be deemed to be more or less majoritarian. Majority rule is not a unitary concept, but a continuum of arrangements ranging from constant direct democracy to officials who are only indirectly electorally accountable. The House of Representatives, the Senate, the President, cabinet agencies, independent agencies, and federal judges all occupy various points on this continuum; exact placement of any institution or office is likely to be a matter of some disagreement.

The fact that federal judges are chosen by the President, approved by the Senate, and subject to impeachment is enough to place them on the continuum, albeit at a different place than the House, Senate, or President. Presidential appointments assure that the Court's ideology, over time, will reflect the general sentiments of the majority in society.[175] In fact, the composition of the Rehnquist Court is largely a result of Republican victories in all but one presidential election in the last twenty years. The Senate's rejection of almost twenty percent of nominees for the Supreme Court in American history has served as another majoritarian influence.[176] This is not to imply that the Court reflects popular opinion or to lessen the importance of its independence from the electoral process. The judiciary is — and was meant to be — more insulated from direct popular pressures. Nor is it to say that the institutions are identical or that the differences in electoral accountability are irrelevant. Analysis cannot be based on the simple conclusion that executives and legislatures are majoritarian

---

administrative process justifies uncertainty about which branch of government, if any, is most likely to hear the majority's voice.

[174] *See, e.g.*, J. CHOPER, *supra* note 134, at 58 ("[T]he Supreme Court is not as democratic as the Congress and President, and the institution of judicial review is not as majoritarian as the lawmaking process."); J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 67 ("[W]e may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures.").

[175] *See, e.g.*, Ackerman, *supra* note 133, at 1056 n.73 (discussing the theories that the Supreme Court is part of the governing coalition and that certain electoral struggles, "critical elections," which redefine the political commitments of a large number of citizens, will also redefine the composition of the Court after a systematic lag time); Adamany, *Legitimacy, Realigning Elections, and the Supreme Court*, 1973 WIS. L. REV. 790, 798 ("Justices are selected mainly for reasons of party and ideology . . . ."); *id.* at 819 ("[T]he Court concur[s], as it inevitably must, in the policies of the elected branches . . . .").

[176] *See* L. TRIBE, GOD SAVE THIS HONORABLE COURT 78 (1985).

and courts are not. This dichotomy is misleading and establishes a great presumption against judicial review.

Although insulated from electoral review, federal judges are not necessarily the least majoritarian federal institution. For example, federal agency heads, who possess relatively long terms and who sometimes are selected with less careful review by the President and the Senate, are probably even less majoritarian than the Court.[177]

Selecting which institution is preferable for which kinds of decisions is a contextually contingent value choice. It cannot be assumed that one point, or even one direction, on the continuum is preferable to others. For example, although arguably the most truly majoritarian, direct democracy in the form of popular referenda is eschewed at the federal level.[178] Determining which body should make what decisions in society requires careful analysis. Because all of the institutions are in some senses majoritarian, and in some senses not, the concept of majority rule cannot be used by itself to choose among them.

2. The Benefits of Judicial Review. — Beyond its mischaracterization of the several branches, the majoritarian paradigm distorts analysis because it largely ignores the dangers of majoritarianism and the advantages of nonmajoritarian decisionmaking. Although majority rule is a value of enormous importance, several dangers seem inherent to majoritarianism.[179] First, it tends to favor short-term desires and give inadequate weight to long-term objectives.[180] Alex-

---

[177] Dean Choper has argued that the anti-majoritarian influences in the electoral process serve to block legislation, rather than to produce laws that are contrary to majoritarian sentiments. *See* J. CHOPER, *supra* note 134, at 26. Just as minorities can block legislation and frustrate majority will, so can they enact legislation. The simplest example is that Senators representing less than 15 percent of the population, together with Representatives serving slightly more than 25 percent of the people can enact a law even if it is opposed by the overwhelming majority of society (assuming that the President is willing to sign it). Special interest groups or single issue voters likewise can push the legislature to *act* in a way opposed by a majority of society. Professor Amar recently explained that legislators can trade their ability to block legislation for votes to adopt laws. *See* Amar, *supra* note 168, at 1084.

[178] Substantial literature challenges this assumption of the majoritarian nature of initiatives and referenda. *See* W. KELSO, *supra* note 159, at 66–70 (explaining that the majority of people do not participate in referenda and that those who do are disproportionately from the upper classes of society; in those situations in which voter turnout is high, as during presidential elections, many voters abstain or vote arbitrarily); Briffault, *supra* note 167, at 1361; Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. (forthcoming 1990).

[179] In this discussion, "majoritarianism" is used to refer to decisions of the electorally accountable branches of government, although the prior section explained why they should not necessarily be assumed to be majoritarian in their actual decisionmaking.

[180] *See* Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 27 (1957) (arguing that Congress, in responding to the popular will, may unknowingly sacrifice long-term values for immediate results). To say that the legislature likely will respond to public pressure is not inconsistent with the earlier discussion of the public choice literature. The legislature may be responding to intense preferences of less than a majority

ander Bickel, for example, argued that legislators often "act on expediency rather than take the long view."[181] As Justice Marshall noted, "[h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."[182] Under such circumstances, judicial review will most likely be effective if the Court functions to check the majority rather than to defer to it.[183]

Second, majoritarian processes often favor tangible goals over abstract values. For example, legislators and executives usually give priority to the desire to combat crime over the more abstract values of privacy and freedom from government intrusion. The government frequently adopts practices with the potential to infringe fourth amendment values — such as drug testing without individualized suspicion,[184] or searches based on drug courier profiles[185] — but rarely enacts laws strengthening citizens' protection from searches by law enforcement agencies.

Third, majoritarian processes often disadvantage political minorities. Groups lacking political power are discriminated against and persecuted. If these groups cannot succeed in forming coalitions to protect themselves in the political process, they may be victimized.[186]

None of this, of course, implies that majority rule is generally undesirable.[187] Rather, analysis of the role of majority rule must be

---

of society. Also, as explained above, the point of the social choice literature is not that legislatures never reflect majoritarian preferences, but rather, that it cannot be assumed that any particular law reflects the majority's will.

[181] A. BICKEL, *supra* note 129, at 25.

[182] Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1422 (1989) (Marshall, J., dissenting). Justice Marshall pointed to examples such as the evacuation and internment of Japanese-Americans during World War II and the suppression of speech during the McCarthy era. Although the Court's record in these instances is not impressive, judicial review is most likely to succeed in such instances in the future if the judicial role is defined as upholding constitutional values against majoritarian pressures in times of crisis.

[183] *Cf.* Engel v. Vitale, 370 U.S. 421, 429–31 (1962) (holding that the first amendment prohibited the State of New York from prescribing any particular form of official prayer in order to protect minority religious groups from government pressure to conform); Cooper v. Aaron, 358 U.S. 1, 16 (1958) (holding that, in a desegregation case in which the Legislature and Governor of the state opposed desegregation of the public schools, the state officials were bound to obey federal judicial orders of desegregation, despite the violent resistance to desegregation by the populace). "[L]aw and order are not here to be preserved by depriving the Negro children of their constitutional rights." *Id.*

[184] *See, e.g.*, *Skinner*, 109 S. Ct. at 1402.

[185] *See, e.g.*, United States v. Sokolow, 109 S. Ct. 1581 (1989).

[186] *See* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 135.

[187] This discussion of judicial insulation from direct political pressure is consistent with the previous section's explanation that all branches of government are somewhat majoritarian. The earlier discussion did not say or imply that the branches are identical in their political responsiveness. Rather, the central point was that no action of government can be assumed to reflect the preferences of a majority of its citizens and that the judiciary, like the other branches, is

contextual: it must identify the circumstances in which electorally accountable decisionmaking is desirable and those in which it should be distrusted. The Court's approach to judicial review fails to give sufficient weight to the values of the judicial method. Allocating responsibility between the courts and the legislatures should take into account the institutional benefits offered by each branch.[188] For example, the legislature can set its own agenda, conduct detailed investigations, respond to the popular will, tax and spend, and fashion solutions to social problems. The judiciary, however, has its own institutional advantages. The political insulation of the federal judiciary compensates for many of the problems with the majoritarian process described above and allows the judiciary to be more attentive to long-term needs, abstract values, and minorities' interests.[189]

Deciding constitutional issues on a principled basis produces great benefits. Traditionally, judges are insulated from personal lobbying, base their decisions expressly on interpretation of the Constitution, and render written opinions explaining the application of general constitutional values to specific situations; all of these attributes lend value to judicial decisionmaking. As Professor Fiss explained: "The function of a judge is to give concrete meaning and application to our constitutional values. Once we perceive this to be the judicial function . . . then we are led to wonder why the performance of this function is conditioned upon legislative failure in the first place."[190]

The Court's treatment of constitutional issues as a matter of principle emphasizes that the judiciary decides each case on its own merits, subject only to the accepted norm that like cases be treated alike. The legislature, by contrast, need not decide each matter before it on its own merits. Logrolling and vote tradeoffs are accepted parts of

---

subject to some majoritarian influences. Careful institutional analysis is necessary and cannot be done by invoking the simple concept that courts are more counter-majoritarian. In part, the institutional analysis needs to account for the insulation of the federal judiciary, because of life tenure and salary protections, to direct political measures.

[188] *See* Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 371–73 (1984) (describing basic operational differences between the judiciary and the other two branches of government).

[189] *See, e.g.*, Wright, *The Role of the Supreme Court in a Democratic Society — Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 12 (1968) ("Maintaining these 'enduring general values' of the community is a task for which the Court's structure makes it peculiarly well suited."). Perry observes that:

> By virtue of its political insularity, the federal judiciary has the institutional capacity to engage in the pursuit of political-moral knowledge . . . in a relatively disinterested manner that has sometimes seemed to be beyond the reach of the electorally accountable branches of government, for many of whose members the cardinal value is "incumbency." . . . [T]he members of the Supreme Court . . . play a prophetic role: first, by taking seriously the prophetic potential of aspirational meaning of the constitutional text; second, by taking seriously the prophetic voices that emerge . . . in the community.

M. PERRY, *supra* note 131, at 147 (footnote omitted).

[190] Fiss, *supra* note 86, at 9.

the legislative process. Although legislators are forbidden by their oaths of office to enact laws that they believe to be unconstitutional, they are not required to provide a remedy every time someone alleges unconstitutional government conduct.

The judiciary is the only institution obliged to hear the complaints of a single person. For the most part, the federal judiciary's jurisdiction is mandatory.[191] In contrast, legislatures and executives respond to group pressure. Individuals or small groups that lack political influence often will be ignored no matter how just their cause. For example, prisoners possess relatively little political power. In many states, felons are permanently disenfranchised from voting, which means that elected officials need worry little about meeting their demands.[192] With no constituency to pressure for their humane treatment, the political process tends to ignore the rights and needs of prisoners.

The strict standards of judicial ethics,[193] which ensure that personally interested judges do not participate, encourages citizens to believe that constitutional issues are decided on principle. Written judicial opinions reinforce this notion and facilitate a public and scholarly discussion about constitutional issues.[194] The Court has the chance to persuade and, at the same time, the Court's reasoning can be criticized and the Court can be persuaded to change its mind. Whether people agree or disagree with the Court, they accept that the Justices are interpreting and applying the Constitution. This helps to ensure that the Constitution remains at the core of society and can continue to serve as a unifying, constitutive document.

Of course, the judicial process contains weaknesses as well. For example, the insulation of the federal judiciary from direct control raises concern that its abuses could go unchecked.[195] Any definition

---

[191] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should."); *see also* Bacon v. Rutland R.R., 232 U.S 134, 137 (1914); *Ex parte* Young, 209 U.S. 123, 143 (1908).

[192] *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding the constitutionality of disenfranchising ex-felons); Comment, *Confronting the Conditions of Confinement: An Expanded Role for Courts in Prison Reform*, 12 HARV. C.R.-C.L. L. REV. 367, 386 (1977) (arguing that prison issues are unlikely ever to generate political support).

[193] *See* ABA CODE OF JUDICIAL CONDUCT (1983). A revealing example is found in B. WOODWARD & S. ARMSTRONG, THE BRETHREN 79–85 (1979). When Thomas Corcoran visited his old friends, Justices Hugo Black and William Brennan, they immediately threw him out of their office when they perceived that he was trying to "lobby" them on a pending case.

[194] *See* E. CHEMERINSKY, *supra* note 141, at 90–95 (explaining why the judiciary's method of decisionmaking is more appropriate for constitutional interpretation than a legislative alternative); Spann, *Expository Justice*, 131 U. PA. L. REV. 585, 598–602 (1983) (noting the importance of opinion-writing to the effectiveness of the judicial method).

[195] A traditional argument against judicial intervention has been that the Court's orders depend on voluntary compliance by the other branches of government and that the Court should

of the Court's role must include consideration of such negative institutional characteristics. The scholarly literature arguing for a restricted judicial role, however, errs in the opposite direction. Scholars emphasize the need for judicial deference to majoritarian processes, but provide little discussion of the pitfalls of majoritarianism or the benefits of the judiciary. Similarly, the Rehnquist Court's emphasis on majoritarianism over all of these other factors tends to overestimate the desirability of majority rule and undervalue the judicial method.

C. The Rhetorical Dysfunction of the Majoritarian Paradigm

The most subtle and pervasive infirmity of the majoritarian paradigm is its focus on the wrong questions. The central issue of constitutional law and theory is not which branch is more "democratic" or how judges can avoid value imposition. The critical issues are substantive disputes about values — the desirable values for the contemporary American political and social order. The rhetoric of the majoritarian paradigm masks these critical issues by reducing these questions of values into mere questions of "competence."

This dysfunction has two related consequences. First, the majoritarian paradigm obfuscates the question of judicial review: the proper inquiry is not how to reconcile judicial review with democracy but which branch of government is best situated to decide the issue at stake. Second, the majoritarian paradigm forces a quest for judicial neutrality that is a specious distraction from the Court's important role in shaping the values of our political order.

1. Allocating Decisionmaking Authority. — Because the Constitution allocates some matters to the political process and shields others from it, the Supreme Court frequently must decide between the value of majority rule and other values. For example, if a federal law is challenged as violating the separation of powers, the case would present, in part, the tension between the desire to defer to the legislative choice and the need to effectuate checks and balances. In criminal procedure cases, the Court must choose between the government's need to use particular investigative techniques and the individual's right to be free from certain types of government intrusions.

---

limit its invalidations to preserve its institutional capital. *See, e.g.*, A. BICKEL, *supra* note 129, at 199–243; J. CHOPER, *supra* note 134, at 55–59 (discussing "executive or legislative opportunity" to bar "rule of the Court" by refusing to enforce or effectuate judicial decisions, and characterizing the "great task of the Court" as "how best to reject majority will when it must, without endangering not only that critical role but its other urgent duties as well"). History provides little support for the fragility of judicial legitimacy. Despite controversial Supreme Court decisions throughout this century, there has been no general disobedience of Court rulings. For a discussion of reasons that judicial activism is unlikely to lessen Court legitimacy and encourage disobedience of Court decisions, see E. CHEMERINSKY, cited above in note 141, at 134–37.

The Court, however, lacks a theory to explain how it identifies constitutional principles or allocates decisionmaking authority. The Court has not described why majoritarianism is desirable, when it is preferable, or when there are sufficiently objective principles to override majoritarian decisionmaking. Lacking such an underlying justification, the opinions often imply that the Court is siding with the elected branches of government because of a commitment to majority rule. But this sounds tautological: the Court prefers majoritarian decisionmaking because it is majoritarian.[196]

Consider an example from last Term: is it cruel and unusual punishment for a state to impose capital punishment on individuals who committed their crimes at sixteen or seventeen?[197] The value of majority rule (allowing state governments to decide the question for themselves) directly conflicts with the alleged constitutional value of not executing juveniles. Favoring the former, the Court reasoned that it could not hold executing juveniles to be cruel and unusual punishment without a showing of "national consensus" against such executions.[198] The Court found that allowing a constitutional objection to the execution of a minor would improperly usurp majoritarian prerogative.[199] However, the question in this case was whether the eighth amendment should be understood as making the option of executing juveniles unavailable to majority rule. Deferring to majoritarian processes begs this question.[200]

Chief Justice Rehnquist's dissent in the flag burning case provides another illustration. He argued that society wants to protect the flag as a unique symbol and that the majority should be able to punish

---

[196] Because no constitutional rights are absolute, almost all constitutional cases force the Court to consider whether the government's action is justified by a sufficient purpose. The answer to this question usually cannot be found in the principle of majority rule or in the statement of the right. It is precisely for this reason that constitutional decisions should openly identify and defend their value choices, and explain why the political majority's preference or the constitutional right prevails in the particular case.

[197] *See* Stanford v. Kentucky, 109 S. Ct. 2969 (1989).

[198] *See id.* at 2977.

[199] *See id.* at 2979–80 ("The audience for these arguments . . . is not this Court but the citizenry of the United States. It is they, not we, who must be persuaded. . . . [I]t is for us to judge . . . on the basis of what we perceive the society, through its democratic processes [state laws], now overwhelmingly disapproves.").

[200] It is possible to argue that this example is atypical because "cruel and unusual" punishment requires the Court to look to common practice in deciding what is "unusual." However, this approach would mean that horrible torture would be permitted under the Constitution so long as most states engaged in the practice. It reduces the function of the eighth amendment to bringing the occasionally deviant state into line with the rest. The preferences of the majority should not determine the nature of the eighth amendment or of any other constitutional right. As Professor Ely observed: "[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." J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 69.

conduct that it deems repugnant.[201] This explanation tautologically uses majoritarianism to justify siding with the majority's desires. An opinion upholding a law prohibiting flag desecration must explain why there is a compelling interest in preserving the flag as a symbol. Correspondingly, it is insufficient to invalidate the law solely by invoking the principle of freedom of speech; analysis, in part, must explain why the government's interest in maintaining the flag is not sufficiently important to sustain the statute.

Constitutional law frequently involves such tensions between majority rule and substantive values. The Court must explain why it prefers one or the other. Because the Court invokes majority rule as the basis for preferring legislative or executive actions over judicial choices, the Court often appears to favor majority rule because it is majoritarian.

2. Making Value Judgments. — Consistent with the dominant majoritarian paradigm, the current Court will declare laws unconstitutional only when there is a violation of clearly established constitutional principles that exist entirely apart from the preferences of the Justices.[202] This desire for objectivity, embodied by the familiar and powerful maxim that judges should apply rather than make the law, is understandable. The law seems arbitrary when results and doctrines turn on the identity of the Justices. The demise of a belief in natural law in constitutional jurisprudence has meant that value choices are seen as a matter of preference that should be made in a majoritarian fashion.[203]

---

[201] *See* Texas v. Johnson, 109 S. Ct. 2533, 2548–55 (1989) (Rehnquist, C.J., dissenting).

[202] *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (1989) (plurality opinion); Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (discussing the need to avoid "the imposition of the Justices' own choice of values on the States and the Federal Government"); Solem v. Helm, 463 U.S. 277, 314 (1983) (Burger, C.J., dissenting) ("Today's conclusion by five Justices . . . is nothing other than a bald substitution of individual subjective moral values for those of the legislature."). Such statements are not new. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 267 (1957) (Frankfurter, J., concurring in the judgment) (arguing that a judicial decision must be based on something more than "personal preference").

However, not all conservative members of the Court describe the judicial task in these terms. *See, e.g.*, Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 789 (1986) (White, J., dissenting) ("The Constitution . . . is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.").

Scholars, too, have noted the desire for value-neutral decision paradigms. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 48 ("[F]ew come right out and argue for the judge's own values as a source of constitutional judgment. Instead, the search purports to be 'objective' and 'value-neutral.'"); Bennett, *supra* note 138, at 447 (stating that the desire for objectivity is the quest for "sources of decision external to the decider's own 'subjective' standards or values"); Maltz, *supra* note 137, at 165 (noting that "most scholars are equally uncomfortable with a constitutional jurisprudence that leaves judges completely free to use their personal value judgments as the measure of constitutional rules").

[203] *See supra* pp. 67–68.

Nevertheless, it seems impossible to construct a meaningful approach to judicial decisionmaking that excludes value choices by individual Justices. The Court has discretion in most constitutional cases and the exercise of discretion is inescapably influenced by a Justice's views. After almost a century of Legal Realism, it is strange to need to establish this point, but the Court and many commentators continue to talk as if it were possible for judges to decide cases wholly apart from their personal views. First, a Constitution written in general terms often requires value choices to determine its content. The constitutional provisions most likely at issue in cases before the Supreme Court are phrased in general language. The process of giving meaning to these terms involves value choices.[204] Examples from last Term abound: is flag burning a form of "speech"? Is government testing of urine for drugs a "search"? Is capital punishment of juveniles or the mentally retarded "cruel and unusual"? Do large punitive damage awards constitute "excessive fines"? Not all language is totally indeterminate or devoid of meaning. The open-textured phrases in the Constitution, however, force the Court to make value choices in deciding specific cases.[205]

Second, even if somehow the Justices' values could be excluded from the process of providing meaning to constitutional provisions, their views would still crucially influence the balancing of competing interests.[206] Because no constitutional rights are absolute, virtually every constitutional case involves the question whether the government's action is justified by a sufficient purpose. Justices cannot decide this without resort to their own values. For example, even if one could "objectively" determine that flag-burning is "speech" for purposes of the first amendment, the question would still arise whether the government's interest in protecting the flag as a symbol of unity is sufficient to justify restrictions on expression. Even if it is established that drug tests are a "search," the issue remains whether the government has sufficient reason to conduct such searches without individualized suspicion. In deciding whether there is a constitutional right to abortions, the Justices must weigh the legislature's interest in

---

[204] Professor Curtis expressed this thought well when he said that the Constitution "comes down to us more like chapter headings than anything else. [The framers] put it up to us, their successors, to write the text." Curtis, *A Modern Supreme Court in a Modern World*, 4 VAND. L. REV. 427, 428 (1951); *see also* Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1196 (1987) (noting that "the language of the Constitution . . . resolves so few hard questions").

[205] *See, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 207 (1980); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 743 (1982).

[206] *See* L. TRIBE, CONSTITUTIONAL CHOICES 5 (1985) (arguing that application of constitutional values to particular cases is "inescapably subjective"). *But see* Aleinikoff, *supra* note 114, at 973 ("Balancing, therefore, must demand the development of a scale of values external to the Justices' personal preferences.").

protecting fetal life against the woman's interest in privacy and in bodily autonomy. Finally, in one case last Term, the Court had to balance the state's interest in protecting the secrecy of a rape victim's identity against the press' right to publish accurate information that it had lawfully obtained.[207] To state the obvious, all such analysis depends on the views of the individual Justices.

Certainly one must assume that all members of the Rehnquist Court recognize that value judgments are inevitable in constitutional interpretation. What they must mean in condemning judicial value imposition is that certain types of value judgments are impermissible. However, they never explained the line between the allowable and the unacceptable. In fact, at times they sweepingly reject all judicial value imposition.[208]

Thus, faced with the seeming inevitability of judicial value imposition, but committed to excluding the Justices' beliefs from decisionmaking as much as possible, some scholars and Justices have tried to solve the problem by developing theories of constitutional interpretation. But more than a decade of intense debate about constitutional theory has revealed that approaches that promise to eliminate (or greatly reduce) judicial value choices are unworkable in practice. When they are modified to be realistic, the desired constraint vanishes. Original intent theory fell prey to this problem in the recent past and the tradition-based approach to interpretation, now favored by some Justices, likely will experience the same fate.

Proponents of originalism defended it largely as a way of avoiding judicial value choices and of limiting the Court's role in a democratic society.[209] They criticized Supreme Court decisions — such as those establishing a right to use contraceptives and to obtain abortions, those incorporating the protections of the Bill of Rights, and those desegregating public schools — for not following the framers' specific intentions. Under originalism, the judiciary may legitimately protect

---

[207] *See* Florida Star v. B.J.F., 109 S. Ct. 2603 (1989) (holding unconstitutional the imposition of liability on a newspaper that accurately reported a rape victim's identity lawfully obtained from a police report).

[208] *See supra* pp. 48–49.

[209] *See, e.g.*, McConnell, Book Review, 98 YALE L.J. 1501, 1525 (1989) ("The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic . . . and not the political-moral principles of whomever happens to occupy the judicial office."); *see also* Berger, *supra* note 140, at 87; Bork, *supra* note 30, at 6. For a discussion of the many problems with originalism, see L. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988), which details criticisms of original intent-based constitutional decisions; Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985), which argues that the framers did not intend their views to control constitutional interpretation; and Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482 (1985), which notes a lack of an adequate normative justification for originalism.

only those rights specified in the Constitution's text or intended by its drafters.

Scholars responded by demonstrating that even on its own terms, originalist interpretation cannot exclude the Justices' own values from the decisionmaking process. Historiographers persuasively argued that the process of historical examination is inevitably interpretive and influenced by the values of the historian.[210] Reading constitutional history for original intent cannot be value-neutral because of the subjective process of deciding whose intent counts (the drafters? the ratifiers? which ones?), of ascertaining which of their views matter, and of determining *the* intent of a large number of people who often had different objectives.[211]

Even if these methodological problems could somehow be solved, however, and an "objective" reading of history were possible, specific intent originalism often leads to absurd conclusions. If the Constitution's meaning is defined only by the drafters' specific views, the Constitution could not govern the modern world. Congress' power under article I to raise an Army and Navy could not include the Air Force because that was not the framers' specific intent. The first amendment could not be applied to the broadcast media nor the fourth amendment to electronic surveillance. The requirements of equal protection could not be applied to the federal government because that was not the specific intent of the drafters of the fifth amendment; nor could the fourteenth amendment be used to outlaw gender discrimination. In fact, if only the specific intent of the framers controlled, it would be unconstitutional to elect a woman as President or Vice President because article II refers to these officeholders as "he" and the framers unquestionably expected that only men would serve in these positions. The notion of a "living Constitution," by contrast, is based on the reality that modern society cannot possibly be governed by the specific views of individuals who lived two centuries ago.[212]

In response to these criticisms, most originalists have come to reject specific intent originalism and instead claim that interpretation should

---

[210] *See, e.g.*, R. COLLINGWOOD, THE IDEA OF HISTORY 218–19 (1946); Florovsky, *The Study of the Past*, in 2 IDEAS OF HISTORY 351, 352 (R. Nash ed. 1969) (stating that history "is always *an interpretation*" (emphasis in original)).

[211] *See, e.g.*, Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 477 (1981) ("[T]here is no such thing as the intention of the Framers waiting to be discovered, even in principle. There is only some such thing waiting to be invented."); *see also id.* at 482–88 (discussing problems in deciding which views count and whose views matter); Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 778 (1983) (arguing that there was no single intent of the framers); Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L.Q. 257, 267 (1982) (pointing out the problems of determining whose intent counts).

[212] *See* A. BICKEL, *supra* note 129, at 107 (quoting Justice Brandeis' statement that "[o]ur Constitution is not a strait-jacket. It is a living organism. As such it is capable of growth — of expansion and of adaptation to new conditions.").

be consistent with the framers' abstract intentions.[213] Although at times even originalists who reject the specific intent approach lapse into it in criticizing particular Court decisions that safeguard rights not specifically intended by the framers. Abstract intent originalism, however, does not substantially limit judicial discretion or avoid judicial value imposition because one can state the framers' views at many different levels of abstraction. For example, should the abstract intent of the framers of the fourteenth amendment be seen as protecting former slaves, protecting blacks, protecting racial minorities, protecting all "discrete and insular" minorities, or protecting everyone in society from unjust discrimination? Deciding the level of abstraction necessarily requires a value choice by the Justices.[214] Moreover, at the highest level of abstraction, the framers desired liberty and equality; almost any imaginable Court decision can be justified as consistent with these values. Although proponents of originalism defend it as a way to constrain the Court, the constraint vanishes once they concede that the Court need only be faithful to the framers' *abstract* intentions.

This conundrum — to be nonabsurd originalism must look to abstract intent but looking to abstract intent does not eliminate judicial value choices — was evident at Judge Robert Bork's hearing before the Senate Judiciary Committee.[215] For many years, Judge Bork advocated interpretation based on specific intent and criticized Supreme Court decisions safeguarding privacy, protecting nonpolitical speech, and outlawing government discrimination against women.[216] He labeled those rulings as judicial value impositions impermissible in a democracy. When testifying before the Committee, however, Judge Bork maintained that the Court needed to be true only to the framers' *general* intent.[217] This made him vulnerable to the charge

---

[213] *See, e.g.*, McConnell, *supra* note 209, at 1524; Bork, *Original Intent and the Constitution*, HUMANITIES, Feb. 22, 1986, at 26.

[214] *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 29, at 134–36 (describing interpretation based on developing modern "conceptions" to effectuate the framers "concepts"); *see also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1091–92 (1981) ("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.").

[215] I explain this more fully in Chemerinsky, *The Constitution Is Not 'Hard Law': The Bork Rejection and the Future of Constitutional Jurisprudence*, 6 CONST. COMMENTARY 29 (1989).

[216] *See, e.g.*, Bork, Federalist Society Speech, Yale Law School (Apr. 24, 1982) *quoted in* Gillers, *The Compelling Case Against Robert H. Bork*, 9 CARDOZO L. REV. 33, 46 (1987) (criticizing the use of equal protection to "restrict groups that were historically not intended to be protected by that clause").

[217] *See Nomination of Robert H. Bork To Be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 817–19 (1987); *Supreme Court Nominee's Record Examined: Bork Faces Tough Questions on Privacy and Equal Rights*, 45 CONG. Q. WEEKLY REP. 2258, 2259 (1987) (transcribing hearing where,

of a confirmation conversion and, more importantly, it made him indistinguishable from all other Justices and scholars who also claim fidelity to the framers' abstract ideals. No longer could Judge Bork claim that his approach had the methodological superiority of excluding the Justices' values from decisionmaking. His criticisms of decisions then had to be viewed as a product of his values and not of a better technique of constitutional interpretation.

The tension between specific and abstract intent originalism — constraint at the price of absurdity, or flexibility at the cost of judicial value imposition — replicates itself in the use of tradition as a method of interpretation. In some recent decisions involving due process claims, notably *Bowers v. Hardwick* and *Michael H. v. Gerald D.*, some Justices appeared to embrace tradition as a method for determining constitutional rights.[218]

However, interpretation based on tradition faces exactly the same dilemma as originalism. As with originalism, supporters must justify why tradition should control interpretation and of determining how to identify the relevant tradition. Putting these questions aside, one must determine the level of abstraction at which to define the tradition. Last Term, Justice Scalia declared that a right should not be protected under the due process clause if there is a specific tradition against such protection.[219] He said that specificity was necessary to constrain judges: "[b]ecause . . . general traditions provide such imprecise guidance, they permit judges to dictate rather than discern society's views."[220]

Justice Scalia's specific tradition analysis freezes the Constitution. Indeed, most of the Supreme Court cases protecting privacy rights under the due process clause (and many other rights under other provisions) would have been decided otherwise under his framework. Alternatively, if one can abstractly define the tradition, judicial value choices are inescapable. In fact, this is precisely why Justice Scalia insists on the use of specific traditions. Given American history's diversity, a tradition can be found to support or condemn almost any practice. As Gary Wills remarked: "Running men out of town on a rail is at least as much an American tradition as declaring inalienable

---

after reviewing several examples where the framers' specific views could not be applied to modern circumstances, Bork declared: "Any judge who today thought he would go back to original intent really ought to be accompanied by a guardian rather than be sitting on a bench.").

[218] *See, e.g.*, Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 n.6 (1989) (plurality opinion) (focusing "upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man"); Bowers v. Hardwick, 478 U.S. 186, 192–93 (1986) (plurality opinion) (looking to historical traditions for the proposition that "proscriptions against [homosexual sodomy] have ancient roots").

[219] *See Michael H.*, 109 S. Ct. at 2344 n.6.

[220] *Id.*

rights."[221] As with original intent, the choice of how to describe the tradition requires a choice of the level of abstraction, and virtually any result can be justified as consistent with the American tradition of protecting liberty and advancing equality.

Demonstrating that value-free judging is impossible would seem like attacking a "straw person" except for the repeated declarations by Justices and commentators that decisions must be based on principles external to the views of the members of the Court. Several implications flow from this discussion. First, the Court's insistence on constitutional principles that exist entirely apart from the preferences of the Justices will prevent the development of a theory of interpretation. Any theory that attempts to eliminate judicial discretion (even assuming it could overcome other methodological problems) is unacceptable in applying the open-textured Constitution to the modern world. Any theory that allows Justices discretion permits them to make judgments based on their own views. Only the latter is a realistic choice: Justices must make value decisions regardless of whether the constitutional issue concerns the structure of government, federal court jurisdiction, equal protection, or fundamental rights.

Second, the Court cannot justify rejecting a constitutional claim simply by saying that it would require judicial value imposition. The Court must explain why the particular value involved does not warrant judicial protection. All judicial decisions — those accepting or rejecting constitutional claims — entail value choices by the Justices.

Third, commentators often pay insufficient attention to the distinction between discovery and justification. Justices must write opinions that justify their decisions as more than personal preferences. Drawing on text, the framers' intent, tradition, social precedent, and much more, the Court must explain why its ruling reflects the appropriate way to understand the Constitution. Frequently, Justices write opinions that imply that the result is merely deduced, or even preordained, from these sources.

A Justice's inability to justify a result by saying that it is a personal choice does not mean that the Justices' values are (or can ever be) absent from the decisionmaking process. As explained above, a Justice's values often will crucially influence his or her decision as to what the Constitution means or how to balance individual rights against the government's interests. Ideally, a Justice's "discovery" of how to vote in a case never will be preference in the sense of a whim; it always will be a carefully thought-out choice of the best way to understand and apply the Constitution. But no matter how much Justices seek to write opinions that justify results in terms of society's

---

[221] G. WILLS, INVENTING AMERICA at xiii (1978); *see also* J. ELY, DEMOCRACY AND DISTRUST, *supra* note 11, at 60–62.

public values, no interpretive method can eliminate the Justices' personal values from the decisionmaking itself.

It is perfectly appropriate, indeed necessary and desirable, to criticize a Justice's justification if it inadequately explains why a value deserves constitutional protection. Likewise, Justices who reject constitutional claims should be criticized if they do not sufficiently justify their conclusions. Ultimately, a particular type of judicial justification — rejecting a right because it would require a value choice by the Court — is inadequate.

D. A Vanishing Constitution?

Almost twenty years ago, at the end of the Warren Court era, Professor Alexander Bickel wrote:

> Over the entire "thrilling tradition of Anglo-American law," the natural trend has been toward the transfer of policy-making authority in one subject after another from judges to legislatures. That has been the movement of the common law itself. That also, in the long view, has been the movement of American constitutional law. A vast domain of social and economic policy, occupied by the Court under the banner of the Commerce, Contract, Due Process, and Equal Protection Clauses of the Constitution, is now under the province of legislatures.[222]

This trend has accelerated dramatically in the past two decades. The current Court's approach to constitutional interpretation often leads it to side with the government in constitutional cases. Certainly it will occasionally invalidate laws; but it will be far less likely to do so than either the *Lochner* era or Warren Courts. The current Court appears motivated primarily by a desire to avoid judicial value imposition, a philosophy that makes judicial invalidation of government decisions problematic.[223] Moreover, majoritarianism demands great acquiescence to the decisions of politically accountable institutions. Interestingly, Professor Bickel also made this point, two decades ago. He wrote:

> Majoritarianism is heady stuff. It is, in truth, a tide flowing with the swiftness of a slogan. . . . The tide is apt to sweep over all institutions, seeking its level everywhere. The tide could well engulf the

---

[222] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 179 (1978).

[223] It is possible that the Rehnquist Court will be activist in protecting matters such as economic rights and federalism. In its first Term under Chief Justice Rehnquist, the Court appeared to use the takings clause to limit government actions more aggressively. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). However, the Rehnquist Court has not thus far continued this pattern. *See, e.g.*, Browning-Ferris Indus. v. Kelco Disposal, Inc., 109 S. Ct. 2909 (1989); Duquesne Light Co. v. Barasch, 109 S. Ct. 609 (1989).

> Court also. It will be difficult to evolve a rhetoric of survival [of judicial power] in a climate of uncompromising majoritarianism.[224]

It is only slight consolation that all government officials take an oath to uphold the Constitution and that all, ideally, interpret the Constitution in choosing their course of conduct. Observers almost unanimously conclude that officials outside the judiciary rarely reflect on the meaning of the Constitution. As Dean Brest recently wrote: "If Congress ever had a strong tradition of determining the constitutionality of its enactments, it no longer exists today."[225] Without judicial enforcement, the Constitution is little more than the parchment that sits under glass in the National Archives.[226]

Several factors account for this. First, political pressures and expediencies often make it unlikely that Congress, the President, or state legislatures or executives will deal carefully with constitutional issues.[227] Is it likely, at this time in America's history, that a legislature would enact the exclusionary rule by statute? Was the almost unanimous Senate condemnation of the Supreme Court's decision in the flag burning case the result of the Senators' own constitutional

---

[224] A. BICKEL, *supra* note 222, at 111–12.

[225] Brest, *Congress as a Constitutional Decisionmaker and Its Power To Counter Judicial Doctrine*, 21 GA. L. REV. 57, 92 (1986); *see also id.* at 85 ("By the second half of the twentieth century, both the House and the Senate had abandoned the tradition of deliberating over ordinary constitutional issues.").

[226] In contrast, Professor Nagel argues that judicial review is largely unnecessary and undesirable. *See* R. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 3 (1989) (concluding that courts "should seldom hold the acts of other branches and levels of government to be unconstitutional"). Professor Nagel argues that judicial review destroys "the general health of the political culture," *id.* at 23, and that it may "undermine the capacity for durable constitutional government," *id.* at 25. He maintains that "judicial review is largely unnecessary and destabilizing." *Id.* at 27.

Although a lengthy response to Professor Nagel is beyond the scope of this Foreword, Professor Nagel's position rests on two unjustified and incorrect premises: that the politically accountable branches will voluntarily comply with the Constitution absent judicial enforcement, and that judicial review seriously hurts society. As to the former, history does not support the conclusion that judicial review is unnecessary. As explained below, it is quite unlikely that fidelity to the Constitution will be one of the primary objectives of the politically accountable branches.

Moreover, Professor Nagel's argument that judicial review is harmful is difficult to assess because it rests on so many unstated assumptions. What is the measure of "health of the political culture" or "stability"? In what way is judicial review unhealthful or "destabilizing" and what harms does society suffer as a result? Why believe there would be more stability without judicial review? Furthermore, even if judicial review has ill effects, how are they to be balanced against the benefits in safeguarding rights or enforcing structural provisions that otherwise would be ignored?

[227] Judge Abner Mikva, a former Congressman, wrote: "Regardless of the rhetoric that emanates from Congress, the legislature has for the most part . . . left constitutional judgments to the judiciary. This . . . has been due in part to institutional pressures and in part to political convenience." Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C.L. REV. 587, 588 (1983).

analysis? At the very least, government officials desiring to act in a manner that is of questionable constitutionality are likely to resolve doubts to permit their action.

Second, the nature of the decisionmaking process in the other branches of government makes constitutional analysis relatively unlikely. For example, Congress possesses no established procedures for addressing constitutional questions.[228] Unlike courts, which must hear the constitutional claims of even a single litigant, legislatures are more likely to respond only to pressure from an interested group.

Third, and perhaps most importantly, a strong tradition now ascribes constitutional meaning to judicial interpretations. Therefore, if the Court does not give a provision any content, it has none. The parts of the Constitution that are not judicially enforced are likely to be enforced by no one.[229] Less judicial intervention will not mean more active constitutional interpretation and enforcement by other branches of government. Indeed, the victory of the government in the courts legitimates its actions and encourages it to be even less observant of the Constitution by lessening its fears of judicial invalidation.

Perhaps talk of a vanishing Constitution sounds too alarmist and hyperbolic. After all, the Supreme Court still exists and it still defines its task as enforcing the Constitution. But the danger is that incrementally less of the Constitution will be enforced or followed. As Professor Charles Black wrote, almost thirty years ago:

> The constitutional power of the Court has too often been presented . . . as something predominately dangerous and only doubtfully beneficial, something to which caution is the prime directive, something to be hedged in and cut down and diluted as thin as can be. . . . Though some of the people who represent this point of view represent themselves in a more oracular subtlety, their ways of thought must lead to a most flatly unsubtle conclusion — the end of judicially implemented constitutionalism as a living component of government.[230]

The majoritarian paradigm creates a Constitution that will matter ever less as a check on government in American society.

IV. TOWARD A NEW PARADIGM

Lacking an affirmative agenda for constitutional law, the Rehnquist Court defines its role negatively by reference to an explicitly

---

[228] *See* Brest, *supra* note 225, at 92–93; Brest, *supra* note 112, at 183.

[229] *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220 (1978) ("[A]s a general matter, the scope of a constitutional norm is considered to be coterminous with the scope of its judicial enforcement.").

[230] C. BLACK, THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY 2 (1960).

stated desire to refrain from imposing judicial values and an implicit desire not to usurp decisionmaking by electorally accountable officials. This approach to constitutional law must be understood as the product, perhaps the culmination, of forces that began early in American history and that have been especially powerful since the mid-1930's. However, this Foreword has argued that the concerns that animate the Rehnquist Court are misguided and inappropriate as a basis for constitutional law. At a minimum, it is grossly inadequate for the Court to reject a constitutional claim simply by saying that recognizing it would entail imposition of the Justices' preferences or that accepting the claim would usurp majoritarian decisionmaking. The Court must explain why the value choice used by the constitutional claimant is unworthy of judicial protection and why the particular decision is better left to the elected branches of government.

I believe the future of constitutional law and scholarship hinges on repudiating the foundation of the Rehnquist Court's approach to constitutional law — the majoritarian paradigm. Constitutional law generally involves two interrelated questions: first, what substantive meaning should be imparted to specific constitutional provisions; and second, what is the proper role for the judiciary in American society? Repudiating the Rehnquist Court's quest for value neutrality would permit meaningful discussions as to the former — what values deserve constitutional protection under what circumstances. Moreover, eliminating the emphasis on majoritarianism would allow the development of far more sophisticated and useful institutional analysis in allocating decisionmaking authority. Better theories for when to distrust decisions of the other branches of government and when courts should become involved due to their institutional strengths must animate judicial review.

Thus, rejecting the premises that have controlled constitutional law for decades would be liberating. It would provide the opportunity for the development of meaningful constitutional theories; it would encourage greater judicial candor; and it might stimulate more independent constitutional protection by the other branches of government.

First, constitutional theory is inevitably futile if it must provide a method of decisionmaking without judicial value imposition or a way to reconcile judicial review with majority rule. The development of alternative theories of constitutional law requires the abandonment of emphasis on avoiding judicial value imposition and deferring to majoritarianism. The recent surge of writing on republicanism[231] offers one possibility. Republicanism's allure, in part, is that it avoids viewing American democracy as primarily based on majority rule and it justifies judicial value choices based on its concept of "civic virtue."

---

[231] *See* sources cited *supra* note 20.

Similarly, "personhood"-based theories of judicial review posit individual dignity as the ultimate concern and view institutional arrangements such as majority rule and judicial review as instrumental.[232] Many other theories certainly also could be advanced and debated; some might expand the judicial role and others constrict it. There is no assurance that "better" decisions will result from the new premises. But that hope exists only if the Court breaks free from the majoritarian paradigm that constrains its analysis and the development of constitutional theory.

Second, repudiating the majoritarian paradigm also enhances the likelihood of judicial candor.[233] Now, too often, Justices explain their rulings rejecting constitutional claims by asserting that they are refraining from value imposition and/or are deferring to majoritarian institutions. This assertion, however, masks their actual value choices.

More than anything else, I believe that the simplicity of the Rehnquist Court's premises and approach obscures key questions. It allows the Court to appear to have avoided value choices by deferring to the political process, when in reality it has made a value choice in choosing such deference. Because of its approach to constitutional law, the current Court does not adequately address the basic question of what matters are worthy of constitutional protection. Too often, maxims about avoiding judicial value imposition and deferring to democracy substitute for analysis.

The Justices cannot avoid value choices in constitutional decisionmaking, whether the case involves issues of separation of powers, federalism, equal protection, or fundamental rights.[234] Constitutional law is now, will be, and always has been, largely a product of the views of the Justices. Every student of constitutional law surely believes that the difference between the *Lochner* era Court and that dominated by President Roosevelt's appointees resulted from the ideology of their respective members. No one would deny that the

---

[232] *See, e.g.*, D. RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

[233] *See* Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

[234] *See supra* pp. 89–95. Professor Mark Tushnet recently argued at length that each approach to judicial review permits judicial value imposition and he contended that such "discretion is unacceptable in the liberal tradition." M. TUSHNET, *supra* note 151, at 182. I agree with Professor Tushnet that every approach to judicial review does create discretion. However, I am not sure how judicial review can be inconsistent with the "liberal tradition." If 200 years of American experience are evidence of the liberal tradition, then, by definition, judicial review is not inconsistent with it. Moreover, although it is beyond the scope of this Foreword, I think that a strong argument can be made that Professor Tushnet begins with too simple a definition of liberalism. *Cf.* Fallon, *What is Republicanism and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1697 (1989). At minimum, I think the solution is to revise the definition of liberalism to accommodate the practice of judicial review, rather than criticize judicial review for being discretionary.

Burger and Rehnquist Courts decide cases much differently than the Warren Court because of a shift in the ideology of the members.

In almost all controversial cases, the decisions result from the Justices' value preferences.[235] The Court can be criticized for the choices it makes but not for making choices. Whether abortion, sexual orientation, or flag burning is a fundamental right and whether it is outweighed by the government's claimed interests cannot be determined by any principles external to the Justices. The weight given to precedent or the instances in which the Court should defer to other branches of government also involve value choices. The Court should stop pretending that objective constitutional principles exist apart from the preferences of the Justices.[236] But "preferences" should not imply whim: Justices must explain why their views appropriately interpret and apply the Constitution.[237]

The relevant and crucial questions are: what values are worthy of constitutional protection, and when is judicial protection appropriate? In large measure, discussions of constitutional law should focus on this. Alexander Bickel explained: "[It] remains to ask the hardest questions. Which values . . . qualify as sufficiently important or fundamental or whathaveyou to be vindicated by the Court against other values affirmed by legislative acts? And how is the Court to evolve and apply them?"[238] In this sense, the Constitution truly provides the framework for society to debate its most troublesome issues. The majoritarian paradigm simply masks these important questions.

---

[235] Eleven years ago, in his Foreword, John Ely argued that judicial protection of fundamental rights inevitably entailed judges imposing their own preferences and thus is illegitimate in a democratic society. *See* Ely, *supra* note 11. All constitutional issues involve such judicial value imposition for exactly the reasons Ely describes: originalism is futile and misguided and no theory can eliminate value choices. Although I agree with Ely's premise, I reach just the opposite conclusion: it is time to accept and embrace what the Court has been doing for 200 years — making value choices.

[236] This does not mean that there are no constraints on judicial decisions. Too much of the discussion of constitutional law describes the world as having only two extremes, formalism, which denies all discretion, or radical indeterminacy, which accords total discretion. The reality is someplace in between. Constraints usually exist in the sense of creating the outer limits on judicial action; they narrow the range of choices that could be regarded as reasonably permissible. To be sure, Justices have the naked power to rule as they wish, subject only to impeachment or constitutional amendment, but discretion means the more limited "power to choose between two or more courses of action each of which is thought of as permissible." H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW 162 (tent. ed. 1958); A. BARAK, *supra* note 150, at 7–8.

[237] Thus, this view is not license for Justices simply to decide each case according to a personal preference as to the most desirable outcome. The Justices must decide the best way to interpret the Constitution. A Justice might therefore vote differently as a Justice than as a legislator, even though both actions involve the exercise of "preferences," because the legislator's preferences about the desirability of a bill might not be constitutional grounds for the Court to reject it.

[238] A. BICKEL, *supra* note 129, at 55.

The eleventh amendment cases provide one example of such rhetorical masking. In *Pennsylvania v. Union Gas Co.*,[239] both the majority and the dissent justified their conclusions about state sovereignty by invoking the framers' intent. The conservative Justices contended that the framers meant to preserve state sovereign immunity; the liberal Justices argued that article III, and the Constitution generally, were intended as limits on such immunity. Their disagreement is not about history. The Justices' real dispute — the subtext of the opinions — is the importance of state sovereign immunity compared to state accountability. A more candid consideration of the underlying values might have led to a better understanding of the competing interests, to an improved decision, and perhaps to increased public comprehension of the important political issues involved in this jurisdictional question.

Constitutional law should begin with the idea that society should have an institution, the Court, that is not popularly elected or directly electorally accountable identify and protect values that are sufficiently important to be constitutionalized and safeguarded from political majorities. The Court provides content to the Constitution by applying the text's abstract values to concrete, modern problems. As such, Justices should openly explain and defend their value choices, and thus persuade observers of the best way to understand and apply the Constitution.

Finally, repudiating the majoritarian paradigm can free the other branches of government to engage in independent constitutional analysis and enforcement of constitutional norms. An important difference exists between a theory of judicial review and a theory of constitutional interpretation. The Rehnquist Court's approach to judicial review reflects its institutional concerns about the role of the judiciary. The Court's refusal to recognize or protect a constitutional right does not mean that other government institutions need be so limited. In fact, the more institutional considerations affect the Court's constitutional decisionmaking, the greater the need for independent interpretation by branches not so constrained.

The principle that the judiciary is the ultimate arbiter of the meaning of the Constitution has allowed it to "umpire" conflicts among the branches of government. However, equating the Court's views with the Constitution has a pernicious effect when the judiciary decides that a matter is not constitutionally protected. A Court decision not to recognize a right or to enforce a constitutional norm effectively eliminates the right or vitiates the norm.[240] Such an approach wrongly equates judicial review with constitutional interpretation.

---

[239] 109 S. Ct. 2273 (1989).

[240] *Cf.* Sager, *supra* note 229, at 1220.

For example, when the Court adopts an originalist approach to judicial review and consequently rejects constitutional claims, other government institutions should not be forced into such a constricted view of the Constitution. To the contrary, the more limited the Court's approach to judicial review, the more the other branches should engage in independent constitutional analysis and protection. Particularly for constitutional norms that the judiciary does not enforce, legislative and executive implementation becomes imperative.

New theories, more candor, or additional action by other branches of government will not guarantee "better" results. The chance is worth pursuing in light of the futility and undesirability of the current approach to constitutional law.

V. Conclusion: Talking About the Rehnquist Court

Claiming that it is avoiding the imposition of judicial values, the Rehnquist Court frequently defends its decisions on methodological grounds. Accordingly, this Foreword has concentrated on the Court's approach to constitutional law and not on the desirability of the Court's specific rulings on matters such as privacy, civil rights, or capital punishment. By demonstrating the inadequacies of majoritarianism as a rhetoric and as a judicial philosophy, by showing that it hides the Court's value choices, and by explaining the flaws in the majoritarian paradigm, I hope this Foreword has begun to clear the path so that attention can focus directly on the Court's normative judgments.

The question remains as to how critics of the Rehnquist Court should express their disagreement. History shows that a great deal is at stake in the way critics articulate their disagreements. The criticisms of the *Lochner* era Court have shaped constitutional law for the last half of a century; the manner in which conservatives attacked the Warren Court shaped the current Court's approach to judicial review.

Several forms of criticism are undesirable and even self-destructive. One approach might be for the Court's critics to become originalists to limit possible conservative judicial activism, or to argue for fidelity to precedent as a way to preserve as many earlier liberal decisions as possible. Such arguments rest on the fear that if the current Court chose to abandon its majoritarian philosophy, it would become increasingly activist in using federalism to declare federal legislation unconstitutional, economic liberties to invalidate state and local regulations, and the equal protection clause to make civil rights advancement even more difficult.

This strategy of criticism seems counter-productive and unlikely to succeed. A decade of scholarship has powerfully revealed the flaws of originalism, and the authors of this scholarship cannot sincerely adopt the philosophy that they have so persuasively attacked. Alter-

natively, critics may try to develop a method of interpretation that will assure decisions resembling those of the Warren Court, but not those of the *Lochner* era Court or the Rehnquist Court. A great deal of modern constitutional scholarship has striven to develop an approach that will yield progressive decisions protecting minorities and basic rights, but that does not risk a return to Lochnerism. It is futile, however, to search for a formula that produces liberal but not conservative results. No theory can ensure that a future Court will behave like the Warren Court and not the *Lochner* era Court. Supreme Court Justices have discretion in deciding cases and the choices they make will be a product of their values and views. If the Court overturns *Roe v. Wade*, it will be because a majority of its members do not believe that a woman's right to choose is sufficiently important to restrict the authority of state legislatures to decide the issue.

In other words, constitutional law, now and always, is about values. The critics' task is to expose and identify the value choices that the Court is making, and to explain why the Court's rulings are undesirable. Inevitably, much of what looks like a difference in approach is really a disagreement over substantive goals. It is no coincidence that advocates of judicial review based on original intent were conservatives who disagreed with the substance of the Supreme Court's rulings. Conservative Justices, such as William Rehnquist and Antonin Scalia, articulate a different role for the Court and a different method of interpretation than more liberal Justices, such as William Brennan and Thurgood Marshall. Surely all would agree that this divergence, and their consistent disagreements in specific cases, results from their very different ideologies.

Scholarship should reveal and debate the Court's value choices. Last Term, the Court made normative judgments in permitting the execution of juveniles and the mentally retarded, in allowing more state regulation of abortion, and in limiting affirmative action. This Foreword has tried to show that the decisions cannot be justified by a claim of a neutral or desirable methodology. Ultimately, the decisions must be defended or criticized for the value choices the Court made. There is nothing else.