Therefore, a constitution is desirable if one begins with the premise that there are values which should be safeguarded from majoritarian decision making. The response to this is that it only justifies a constitution if the document enshrines the correct values, those that are indicated by the chosen political or moral theory. In other words, my argument is that a constitution is justified if one believes that there are values worthy of enshrining and that theorists defend the existence of such values. But the constitution, then, is desirable only if it protects the values which justified its existence in the first place. What if the constitution protects the wrong values? There are a wide array of political and moral theories justifying many different values. Can the existence of a constitution be justified without demonstrating that it protects the right values? A constitution would be undesirable if it entrenched disapproved values. For example, a constitution which provided that one race would be slaves to another would be undesirable. As such, it cannot be assumed that just because there are values worthy of protection that the constitution necessarily protects them or that the existence of the constitution is necessarily desirable.

Several responses are possible. One is to argue that there is something inherent to the process of constitution drafting that inclines it toward the right values. But I am not sure why this would be true. Constitutions are usually drafted at times of social crises, such as after a successful revolution, and are usually the product of negotiation. Although it is possible to hypothesize that constitution drafting is a call to reflection about basic values and therefore likely to lead to a document reflecting the moral reality or the deep consensus, I know no way to prove this to be true.

An alternative response is to argue that the benefits of the chance that the Constitution will provide pre-commitment to the right values justifies the risk of the possibility that society will commit itself to the wrong values. As to choosing between no protection of values from social majorities or risking protection of the wrong values, it is better to choose the former. Again, though, proof seems difficult without an explanation for why constitutions are more likely to protect the right rather than the wrong values.

I can see two responses that are more likely to be successful, one particular to the U.S. Constitution and the other abstract concerning constitutions in general. The former approach would be to establish that the U.S. Constitution protects the right values, that is, to develop a political or moral theory to justify the values which are contained within that document. If values such as freedom of speech, equal protection, separation of powers, freedom against self-incrimination, and the others within the Constitution are justified as correct—that is as worthy of protection from majoritarian infringement—then the existence of a document protecting them can be defended. The argument would not be that all constitutions are meritorious, but instead, merely that one containing these values is desirable. My task here is not to justify each of these values, but instead to note that there is ample literature defending each of these norms and to postulate that if one

accepts the existence of these justifications, then the existence of the U.S. Constitution is desirable as a way of protecting the values it contains.

Alternatively, the social contract theories developed by John Rawls provide a possible solution to this problem and explain the continued legitimacy of the Constitution.[28] The argument is that if at any moment the members of society were forming a government, and none knew what his or her position would be under the new government, it is likely that they would create an authoritative constitution to limit government and ensure their protection, should they end up as political minorities. In other words, the desire for a constitution is not limited to those who actually participated in the initial creation of government. Rather, a constitution reflects an ongoing desire to ensure protection of minorities and fundamental rights.

To demonstrate this conclusion, imagine that a group of people were getting together to create a government and all lacked knowledge as to their status and place under the new government. No one would know if he or she would be powerful or powerless, rich or poor. This situation is what Rawls termed the "original position."[29] It is useful in considering how a group of people might want to constitute government because it serves to identify what rational deliberations, excluding considerations of individual self-interest, would produce.[30] Individuals acting from behind the veil of ignorance do not know their individual places in society (class, position, social status) or even their individual assets and abilities (intelligence, strength). What the parties do know are all the general facts about human society—the principles of economics, the history of political affairs, the basis of social organization, and the laws of human psychology.[31]

It is rational and likely that such a group of individuals would want to use a constitution to structure a government. These individuals would want to create a government to provide them with the benefits and services that they will want to receive from government (e.g., military protection, protection of interstate free trade, etc.) At the same time, they would want to make sure that government had limited powers to inflict injury upon them. A constitution would let them create a government with the powers to provide the benefits, but with limits, so as to control government and minimize the chance of harm.

For example, all the individuals likely would fear that if they end up being in the powerless group in society, those in power could establish themselves as dictators with unlimited authority. Thus, there would be a desire to create the structure of government in a constitution that would be followed and could not be changed by those in power in order to make sure that dictatorial power would never exist. Furthermore, these creators would want to specify procedures for changing government officers to ensure that if they are the political minority, they would have the chance to become the majority. In other words, the individuals creating the government would want to enshrine in a constitution the mechanism of political change to ensure that they could not be permanently disenfranchised. A constitution, with control over government and resistant to change, is an ideal

mechanism for limiting the powers of government to minimize the likelihood of future governments imposing substantial harms.

Similarly, all the people creating government are likely to agree to certain basic values, at least when stated abstractly. For example, all might agree that freedom of expression is a good thing. They would fear, however, that future governments might eliminate freedom of speech. Therefore, to protect this shared value they would include it in such a constitution before any knew who would benefit from suppression of speech and who would lose.

In short, it is completely rational for a group of people acting from behind the veil of ignorance to create a constitution to limit government powers and protect themselves from possible injury. To protect themselves, the creators would want an authoritative constitution that would control future government actions. Not knowing whether they will be the majority or the minority, individuals would want to ensure their own protection, should they be in the minority. Thus, the heuristic of the veil of ignorance explains why those framing the government would create a constitution protecting minority rights, notwithstanding a general commitment to rule by the majority. A constitution allows government by majority rule but also provides protection against tyranny by the majority.

A number of objections might be raised to this analysis. First, it might be argued that it is wrong to assume that people will create a constitution to protect themselves from future governments. Instead, why would not individuals acting from behind the veil of ignorance gamble that they would be the ones in power and create a government with the ability to enrich them, both financially and in the ego rewards that unlimited power could provide? Individuals reasoning in this way would believe that what they would gain from such a government if they were in power outweighs what they could lose from a despotic government if they were among the powerless. As P. A. Boynton asks, "The question then is whether or not the 'take no risks' policy which is adopted by parties in the original position . . . should be regarded as the inevitable outcome of rational choice exercised under conditions of the veil of ignorance?"[32]

In answering this objection, consider the thought process of a rational person deciding whether it is better to create a government with limited powers or a potentially despotic government. A person acting from behind the veil of ignorance would realize that it is more likely that he or she would be more powerless than powerful because there are always more people in society, especially despotic societies, who are powerless. Moreover, the harms of a despotic government are potentially enormous—loss of life, absence of all freedoms, maldistribution of wealth. As such, the small chance of being in power would have to promise enormous rewards to justify individuals taking the risk of creating a government with the power to inflict such large harms.

Second, the above analysis can be challenged by objecting to the concept of the veil of ignorance. There are many possible bases for such objections,[33] with one of the most important being that the veil of ignorance inevitably leads to the selection of liberal principles of justice, and hence it is a tool deducing ideolo-

gically biased principles. According to Milton Fisk, the use of the veil of ignorance separates individuals from their real condition as social beings who define and understand themselves primarily in terms of group or class interests.[34] As a result the veil of ignorance forces individuals to adopt the uniquely liberal values of individual liberty and freedom, contradicting the claim that the veil of ignorance is a value-neutral instrument used to ensure fairness and rational deliberations.[35]

This is a powerful criticism but one that can be answered in a number of ways. One response is to concede the criticism and simply to argue that the veil of ignorance heuristic justifies the existence of a constitution and the protection of personal liberties in a society committed to the liberal premise that the individual is the basic unit of society. Since society both in 1776 and now accepts this premise, the objection does not undermine the claim that in U.S. society a constitution should exist to protect the individual. The criticism does reveal, however, why the above argument does not justify the existence of the Constitution for those who dispute the basic liberal ideology that the individual should be the most important consideration in society.[36] In fact, the Rawlsian argument begins with the basic assumption that people behind the veil of ignorance would choose a principle of political equality and majority rule and then perceive the need for protecting minority rights. Again, the point is that Rawls's social contract theory justifies the existence of a constitution only if basic principles of liberal ideology are accepted.

I do not want to rely too heavily on this brief argument from Rawls. It is, however, one way of explaining the desirability of a Constitution in a society committed to rights and equality.

Thus, I have argued that the Constitution reflects a precommitment to basic values, that it was desirable for the Framers of U.S. government to adopt such a document, and that society continues to need such an authoritative text protecting fundamental values. Several implications follow from this analysis. First, it is desirable for society to have an authoritative constitution to prevent tyranny and protect minorities and fundamental values. Society should be governed by a constitution not because the Framers intended it but because the current needs of the people are served by an authoritative constitution. Second, this analysis reinforces the argument made in the previous chapter that society's exclusive concern is not with majority rule; the concept of democracy must be defined to include substantive elements such as protecting the rights of the minority. Thus, as argued in the previous chapter, it is wrong to criticize judicial review for being antimajoritarian because, by definition, the application of an antimajoritarian document is antimajoritarian.

Furthermore, once it is decided that the purpose of a constitution is to protect some things from the majority, the questions becomes, What matters are so important that they must be protected from the majority.[37] This question inevitably is an inquiry into political and moral theory: What values are so important that a majority of society should not be able to infringe them? What processes of decision making are best for identifying and protecting these values?

Thus far I have tried to elaborate a defense for the traditional explanation for the existence of an authoritative constitution: the need to protect the minority from the majority by structuring government and enshrining rights in a document that is controlling and difficult to change. In subsequent chapters, I will explain why this conclusion necessitates a constitution that evolves by judicial interpretation.

The Constitution as a Unifying Symbol

There is another, much less frequently discussed, justification for an authoritative constitution. A constitution written in terms sufficiently general and abstract that almost everyone can agree to them provides enormously important symbolic benefits for society. The U.S. Constitution is written in very broad language. For example, the statement of rights in the Constitution includes phrases such as "freedom of speech," "unreasonable searches and seizures," "due process of law," "cruel and unusual punishment," and "equal protection of the laws." Even provisions of the Constitution dealing with the structure of government are written in general terms. For example, the president is given the power to serve as "Commander in Chief"; Congress is accorded authority "to regulate commerce . . . among the several states"; the judiciary is given the power to decide "cases and controversies."

In part, the Framers chose to write the Constitution in such general terms because it was easier to gain agreement both at the Constitutional Convention and during the ratification process to these more abstract concepts than it would have been to gain acceptance of more specific provisions.[38] The Framers undoubtedly recognized that they could not anticipate all the events and situations that might require constitutional coverage. General constitutional language allows adaptation to exigencies that could not be foreseen.

More important, from a contemporary perspective, the general phrasing of the Constitution allows virtually everyone in society to agree to its contents. Political scientists have long demonstrated that there is widespread social consensus to rights stated in abstract terms but no agreement as to specific applications.[39] A classic study by J. Prothro and C. Grigg found:

> [C]onsensus can be said to exist among the voters on the basic principles of democracy when they are put in abstract terms. The degree of agreement on these principles ranges from 94.7 to 98.0 percent, which appears to represent consensus in a truly meaningful sense. . . . On the generalized principles . . . the agreement transcends community, educational, economic, age, sex, party, and other common bases of differences in opinion. . . . When these broad principles are translated into more specific propositions, however, consensus breaks down completely.[40]

The research of Herbert McCloskey and Alida Brill provides numerous examples to support this conclusion.[41] For example, 97 percent of the U.S. public responded affirmatively when asked: "Do you believe in freedom of speech?"[42]

However, the study found that as "soon as one moved from questions about freedom of speech in the abstract to questions about the exercise of speech in particular situations, the level of support drops off sharply."[43] McCloskey and Brill explain:

[F]ewer than 60 percent of the mass public in our sample would grant freedom of speech to people who are intolerant of the opinions of others. . . . Only 49 percent would uphold the right of individuals to express certain opinions if the majority voted to ban those opinions. Even fewer would permit foreigners who criticize our government to visit or study here. . . . Only 18 percent would permit the American Nazi party to use the town hall to hold a public meeting, and only 23 percent would grant a group's request to use a public building to denounce the government.[44]

McCloskey and Brill report similar findings for every constitutional right: almost unanimous consensus to the abstract right and tremendous disagreement as to virtually every particular.[45]

Thus, the Constitution is written in sufficiently abstract and general language so that virtually everyone in society can agree to its provisions. The Constitution serves as a "condensation symbol"—its ambiguity allows each person to believe that his or her specific conception is embodied in the general language.[46] Such a document, which is believed in by almost all citizens, serves a number of essential purposes.

First, the Constitution serves as a unifying device, increasing the legitimacy of government and specific government actions. Areas of agreement are placed in the foundational document that creates the government. The government has greater legitimacy because people believe in the document that creates the political institutions. Furthermore, the specific actions of the government will have increased legitimacy, and will be respected and complied with despite disagreement, because the process of government is accepted.[47] This legitimacy is especially important in times of crisis because the Constitution provides a source of social stability, and the acceptance of the Constitution provides confidence that problems can be handled from within its structure.[48]

The widespread consensus that the Constitution is desirable provides a powerful symbol that unites the country. Thomas Grey observes that the Constitution "has been, virtually from the moment of its ratification, a sacred symbol, the potent emblem (along with the flag) of the nation itself."[49] Similarly, historians report that the ratification of the Constitution had exactly this unifying effect.

In the early days of the American republic, citizens revered the Constitution because it symbolized a nation united in its pursuit of democracy, egalitarianism and material progress.[50]

The rhetoric of national unity marked the beginning of Constitution worship. The people rejoiced that the disunity of the confederation had been turned into the unity of the Constitution. . . . [A]ll parties had become rival worshippers in the cult of the Constitution which proved the greatest stabilizing force in the new government.[51]

Throughout U.S. history the Constitution has served as an important unifying symbol, providing an "overarching sense of unity even in a society otherwise riddled with conflict."[52] Of course, claims about legitimacy are empirical, and the answers provided here are impressionistic, not quantitative. Yet the absence of any serious cries to substantially reform or eliminate the Constitution in 200 years is powerful empirical support for its social legitimacy.

The Constitution's importance as a unifying symbol is explained by Max Weber's theory of the concept of a nation.[53] Weber said that three factors lead to the existence of a nation and a sense of national unity. First, there needs to be some objective common factor shared by all the people. Second, this common factor needs to be something that is valued within the society and that produces a feeling of solidarity. Finally, this solidarity needs to find expression in political institutions.[54] The U.S. Constitution meets all three criteria: it is a common factor shared by all citizens; it is valued; and it is the basis for government institutions. Thus, not surprisingly, the Constitution has long been regarded as a primary source of national unity.[55]

It is important to emphasize that the Constitution is able to perform these legitimizing and unifying functions only because it is written in general language about which almost everyone agrees. Laurence Tribe explains:

> The value of the Constitution as an evolving repository of the nation's core political ideals and as a record of the nation's deepest ideological battles depends significantly on the limitation of its substantive content to what all (or nearly all) perceive to be fundamentals; a document cluttered with regulatory specifics could command no such respect.[56]

For example, almost all state constitutions are drafted in much more specific language than the United States Constitution.[57] One consequence is that state constitutions are accorded much less respect and relatively frequently have been replaced in their entirety.[58] It is easy to understand why state constitutions change much more rapidly than the United States Constitution. To amend a state constitution requires action of only one legislature. Modifying the federal Constitution requires approval of both houses of Congress and three quarters of the state legislatures. The frequency of change of state constitutions in comparison with the U.S. Constitution is thus revealing of the importance of a stable document in producing legitimacy. Tribe continues: "The cluttered and rapidly changing contents of state constitutions may partially explain why even the most enduring and fundamental provisions of these documents rarely command the respect routinely paid to federal constitutional guarantees."[59]

A second major benefit of a constitution written sufficiently abstractly so that almost everyone agrees as to the language is that disagreement within society is channeled to minimize its potential destructiveness. Areas of agreement are at the center of society, so that disagreements occur in the context of consensus as to the nature of the government and basic values. Dialogue is possible because there are

shared values; disagreement is over the specific content of agreed-upon provisions.[60]

A general constitution thus enables government to overcome potentially destructive forces. A constant problem for all governments is that individuals will act for their personal gains even though the effects of their actions are detrimental to the whole of society.[61] Consequently, there is the danger that individuals in power will attempt to use their authority to perpetuate their advantages, even though such actions would have net negative effects for society.[62] At the same time, those who are losers under such a system have no incentive to remain loyal to the existing system, which fails to meet their needs and perhaps even disenfranchises them. The losers' best protection is to find a way to overthrow the existing system as soon as it is feasible to do so.

A general constitution overcomes these destructive forces. Because the document is general, it does not create permanent winners or losers. The losers can believe in the document because it does not enshrine their powerless status. They subscribe to the values in the document and can believe that they will become winners tomorrow. Winners believe that the document is desirable because they are ahead under it. The losses that result either are the product of extraconstitutional factors, and hence no reason to oppose the document, or are the result of interpretations of the document, in which case the interpretation is attacked, not the document.

Put less abstractly, those who are disadvantaged in society continue to accept the legitimacy of the government because they continue to believe in the fairness of the Constitution. They believe that the Constitution creates a structure of government that protects them and that provides an opportunity for them to advance. Because they subscribe to the basis of the system, they do not constantly reevaluate their support for the government. Charles Elder and Roger Cobb explain:

> No system is likely to be able to withstand the test of a constant and self-interested evaluation of its performance on the part of all or even most of its members. If most people were constantly engaged in the process of weighing the personal costs and benefits involved, it is doubtful that much in the way of collective political action would be possible. However, most persons are not inclined to expend the time, energy, and effort required by such a calculus. Loyalty is tendered as much on the basis of long-standing affective sentiments toward the symbols of the system as it is from any short-term satisfactions derived from the immediate allocation of material or symbolic benefits. This more basic support [arises] in the form of emotive ties to the basic symbols of the system.[63]

In essence, the ambiguity of the Constitution perpetuates a real-world veil of ignorance as people and groups that look to the Constitution see no indication from it as to whether in the future they will be powerful or powerless. If they are the minority, they will want the protection of the Constitution and its assurance

that they will have the chance to become the majority. Thus, there is continued support for the Constitution and the processes of government it creates. A general constitution allows all individuals to believe that their personal benefits from the system exceed their costs.[64] However, as discussed later in this chapter, it must be recognized that this legitimacy and acceptance could be thought of as a negative if people accept undesirable situations and do not adequately work to improve things because of false assumptions about what the Constitution can provide.

Furthermore, a constitution written in abstract language helps society mediate the tension between a social desire to bind itself to prevent harmful decisions and a desire to permit change and flexibility. There is an inherent conflict between a desire for precommitment to lessen the chance of errors and a desire for freedom to choose to achieve desirable results in particular cases. A constitution written in general language allows society to have some of both: precommitment to basic values but with the opportunity for future generations to interpret them to achieve just results in specific situations and for particular times. Though, of course, this could produce the worst of both worlds, instead of the best.

This analysis establishes that it is desirable to have an authoritative constitution not only to protect minorities but also to reap the enormous benefits that flow from the existence of a widely supported foundational document. Subsequent chapters will develop the implications of this conclusion for constitutional interpretation. For example, the fact that the Constitution is written in general terms ensures that it cannot be applied to yield determinate results in particular cases. Inevitably, its general language will not provide clear answers to most constitutional controversies.[65] General statements of "principle necessarily leave their specific implications open to future debate."[66] Interpretation is necessary to apply abstract areas of agreement to specific situations where there is disagreement. It is futile to search for a method of constitutional interpretation that leaves no discretion and deductively applies the Constitution to yield determinate, objectively correct results.[67]

Moreover, the desirability of a constitution sufficiently general as to be supported by widespread consensus has important consequences for the manner of constitutional evolution. As will be argued in Chapter 4, it is undesirable for the Constitution to evolve solely through amendments because if every modification of the document required an amendment, the document would be cluttered with divisive specifics. The Constitution would lose its constitutive function.

As alluded to above, some might object that the unifying function of the Constitution is undesirable. They could argue that in light of the above analysis that the Constitution deceives the losers in society's power struggles into accepting a system that is to their detriment. The claim is that the losers are falsely led to believe that they can win in the future, that the Constitution creates an open system, and that their interests are being protected. Ultimately, the conclusion of this criticism is that the Constitution gains unity but at the price of divisiveness that might help those inadequately served under the current system.

This argument cannot be lightly dismissed or easily answered. Responding to this objection raises basic questions: Are the losers in the current political system better off within it than they would be under the alternatives? Is society as a whole better off with the existing system? These inquiries raise foundational questions, obviously beyond the scope of this book, about the desirability of the U.S. system of government. At this juncture, I simply wish to acknowledge my assumption and recognize that my analysis is premised on the desirability of such features of U.S. government as majority rule, desire to protect minorities, and liberal ideologies such as those emphasizing individuals and their rights. Ultimately, the question is, Would more people be better off, on balance, with a radically different system of government? Accepting axiomatically the desirability of the U.S. political system and its commitment to liberty and to equality, to majority rule and to protecting minority rights, the Constitution is invaluable in allowing society to protect its values.

SOCIETIES WITHOUT CONSTITUTIONS

The analysis in this chapter makes it seem as if the existence of an authoritative constitution is almost inevitable. Such a conclusion would explain why most constitutional commentators have simply assumed that the U.S. Constitution is controlling. Yet what is troubling about this conclusion is that it ignores the fact that most countries do not have an authoritative constitution.[68] Therefore, in concluding the discussion of why it is desirable to have a constitution, it is worth considering why a society might choose not to have such a controlling document.

Why would a society choose to be governed without the legal limits that a constitution imposes on government? The analysis in this chapter suggests that the absence of a constitution likely reflects one of two situations. One is that there is sufficient consensus in society about basic values and sufficient trust in the majority and its representatives to make a constitution unnecessary. In other words, the society believes that individuals possess rights, but it believes a constitution is unnecessary to protect those rights because the majority can be trusted. Alternatively, the absence of a constitution might reflect the belief that there is no need to protect the individual from the state because the individual possesses no rights or powers apart from the state. If the state is regarded as all powerful, it would be inconsistent to have an authoritative constitution limiting the government. The former description explains the absence of a constitution in Great Britain; the latter explains the absence of an authoritative constitution in the Soviet Union.[69]

Great Britain, despite its long history of commitment to individual rights, has no written constitution.[70] Unlike the United States where the Constitution is authoritative, in Great Britain, Parliament is the final source of legal authority.[71]

The doctrine of parliamentary sovereignty accords Parliament authority to enact any law. J. A. Jalowicz explains:

> It is well known that Great Britain, of which England forms part, has no written Constitution. The doctrine of the Supremacy of Parliament is fully established, there is no higher law than an Act of Parliament and it is impossible for any one Parliament to bind its successors.[72]

No authoritative document limits Parliament. Nor do individuals possess any rights that they can assert as a defense to an act of Parliament.[73] Theoretically, Parliament could pass a law to prevent the conviction of a favored individual, or even to overturn a conviction already reached by the judiciary.[74] One commentator described the extent of Parliament's authority by saying that it "is a fundamental principle with English lawyers that Parliament can do everything but make a woman a man, and a man a woman."[75]

The absence of a constitution in Britain can be understood as reflecting trust in Parliament. The strong tradition of concern for individual rights provides the basis for confidence in the majority. The fear and distrust of government power that, in part, explains the U.S. Constitution seems less prevalent in Great Britain. Nevil Johnson explains:

> Britain [is] . . . different from other mature political societies [because of an] . . . extraordinary and basically unbroken continuity of traditional political habits. The uniqueness of the British Constitution is to be found in the fact that it has erected that very insight into a dominant feature of the Constitution itself. It appears to eschew rules and principles so far as possible, proclaiming instead that the rights and procedures which it claims to protect have their security and continuance in particular political habits and understandings and only there.[76]

Thus, the absence of a constitution reflects social consensus and trust in Parliament. Interestingly, in recent years, there have been increasing calls for the creation of an authoritative constitution.[77] Commentators have argued that there no longer is sufficient commitment to traditional values and beliefs, nor sufficient consensus as to how power should be exercised, to provide adequate protection of civil rights or ensure the survival of a particular form of government.[78]

By contrast, the absence of an authoritative constitution in the Soviet Union reflects not trust in the majority but rather a belief that the state is above the law.[79] Although there is a Soviet constitution, it imposes little in the way of actual restrictions on the government's powers. Olympiad S. I. Ioffe and Peter B. Maggs explain:

> [W]hile Common Law in the United States can be called the system of legal constitutionalism, and Civil Law in West Germany assumes the name of the system of the legal state (*Rechtsstaat*), Socialist Law in the USSR, in contrast, appears as a system of legal restrictions supported by the state which is itself legally unrestricted.[80]

Marxist doctrine dictates that the individual is liberated only through the liberation of the masses.[81] When the interests of the masses coincide with the individual's claims, there is no problem; but when they conflict, the masses' interests must prevail.[82] Accordingly, it would be inconsistent to have an authoritative constitution to limit the majority or to protect the individual from the state.

The Soviet Union does have a written constitution detailing numerous individual rights. For example, the Soviet Constitution grants freedom of speech, freedom of the press, and freedom of assembly.[83] However, the constitution states that these rights are to be exercised "in accordance with the peoples' interests and with a view to strengthening the socialist system."[84] Thus, the state is accorded full authority to override any rights contained in the constitution, and individuals have no right to challenge the decisions of the state. In other words, it is the state that is authoritative, not the constitution.

This brief examination of the British and Soviet systems reinforces the conclusion that an authoritative constitution is desirable and necessary in the United States. The assumptions of neither the British nor the Soviet system are applicable in the United States. In the United States, as already explained, there is widespread consensus only as to abstract statements of rights.[85] There is no tradition of legislatures protecting rights, and no basis for trust that government will protect the rights of the minority. To the extent that the absence of a constitution requires trust in government, the United States needs a constitution because from the earliest days of the Republic there has been fear of tyranny by the majority. In addition, it must be remembered that the number of government units, including federal, state, and local entities, is well into the tens of thousands. Each needs to be controlled to prevent infringements of basic values.

Furthermore, the assumptions of the Soviet system are directly contrary to the philosophical underpinnings of U.S. society. In the United States, there is a belief that individuals possess rights and that the individual deserves protection from the wishes of the masses. Unlike the Soviet Union, which puts the state above the law, in the United States a preeminent concern is limiting the power of the state to prevent tyranny.

In other words, what this analysis demonstrates is that the absence of a constitution would be inconsistent with basic aspects of U.S. society. The examination of the British and Soviet systems reinforces the conclusions of this chapter: that an authoritative constitution is desirable to guard fundamental rights, to ensure protection of minorities, and to provide a powerful unifying symbol. Hence, the best method of constitutional decision making is the one that accomplishes these objectives.

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3 Should the Constitution Evolve or Remain Static?

A key issue in the dispute over the proper method of constitutional decision making is whether the meaning of the Constitution is fixed and permanent or whether it can change and evolve. Advocates of judicial restraint frequently articulate the former static position. They frequently quote Thomas Cooley's statement, in his famous treatise on the Constitution: "The meaning of the Constitution is fixed when it is adopted and it is not different at any subsequent time."[1] There are similar declarations from the United States Supreme Court. For example, in *South Carolina v. United States*, in 1905, the Court stated: "The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted it means now."[2]

In contrast, those who believe that the Constitution should evolve evoke the famous words of Chief Justice John Marshall, in *McCulloch v. Maryland*: "[W]e must never forget that it is a Constitution we are expounding. . . . [A constitution] intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."[3] Contemporary scholars such as Robert Bennett thus argue, "[I]t is the expectations of each succeeding generation, interacting with evolving notions of public policy, that matter."[4]

The debate over whether the Constitution should evolve or remain static actually poses two distinct, although certainly interrelated, questions. One issue is that described above: Is—and should be—the Constitution subject to change? The second question is, If the Constitution is to evolve, how should such evolution occur? Usually, the latter inquiry concerns whether the meaning of the Constitution should evolve by interpretation or only through the amendment process.

It is extremely important to recognize that these are two separate questions. First, the distinction matters for the sake of clarity. Although scholars frequently express the view that the meaning of the Constitution should remain static,[5] what

they most likely are saying is that the Constitution should be altered only through amendment. No one appears to take the position that all changes in the document, even by amendment, should be impermissible. In other words, those who argue for a static Constitution are not arguing, as their language makes it seem, that the Constitution should never be changed. Rather, they are taking a position as to how modification should occur. However, their phrasing of the issue inevitably evokes responses explaining why the Constitution should evolve.[6] The two sides of the debate do not address each other because they fail to realize that there are two separate questions at issue.

Second, it is important to treat the two questions separately because there truly are two distinct questions worthy of examination. Virtually all modern U.S. scholars would concede that there needs to be some mechanism for changing the Constitution.[7] The Constitution includes a provision specifying the procedure for amendment, thus making it seem irrelevant to ask whether the Constitution should be immune from change.

However, it is possible to imagine a society choosing a document that is permanent and not subject to any change, or at least that identifies particularly important provisions and specifies that these clauses may not be revoked or amended. For example, the constitutions of West Germany and Brazil expressly state that the division of power between the national and local governments is not subject to amendment.[8] Morocco's constitution states that it may not be amended to eliminate the monarchy or Islam as the official religion.[9] Nations that have experienced foreign occupation often have provisions limiting amendment in the case of future foreign invasion. For example, the constitution of the French Fourth Republic, adopted in 1946 in the wake of liberation from Nazi control, prohibited amendment of the constitution "in case of occupation of all or part of the metropolitan territory by foreign force."[10] The current French Constitution, adopted in 1958, continues this prohibition, forbidding amendment "when the integrity of the territory is in jeopardy."[11]

In fact, even the United States Constitution specifies certain matters that could not be changed, even by amendment. Article V, which details the amendment process, states: "Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the First Article; and that no State, without its consent, shall be deprived of equal Suffrage in the Senate." Article I, section 9, clause 1, prohibits Congress from prohibiting the importation of slavery until 1808; and Article I, section nine, clause four, stated, "No Capitation, or other direct, Tax shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken."

Thus, it is conceivable that a society might choose to have unalterable constitutional provisions. The decision for permanence might reflect a political compromise necessary for ratification, such as the provisions in the U.S. Constitution mentioned above. Alternatively, a society might prohibit amendment if

it believes it has found certain enduring truths that it wants to protect from heretics. An example of this would be a constitution that expressly declares the religion for the society.[12] A permanent, unalterable constitution also could reflect a society that fears change and greatly values the stability that it believes a static constitution provides. Accordingly, it is necessary to consider not only how a constitution should evolve but also whether it should evolve or remain static.

Finally, and most important, it is important to consider the reasons why a constitution should evolve in order to decide the manner by which such evolution should occur. In other words, if it is established that it is crucial that the U.S. Constitution should evolve, then the second question becomes an instrumental inquiry of how to best accomplish evolution. Specifically, once it is accepted that it is essential that the Constitution should evolve, then it is relatively easy to establish that the evolution should occur through interpretation and not just by amendment. If the Constitution could change through amendment only, virtually no evolution would occur.

Therefore, this chapter addresses the first question: Should the Constitution evolve or remain static? The following chapter addresses the second question, How should evolution occur? That is, should evolution be by interpretation or only by amendment? Subsequent chapters consider who should interpret the Constitution and how they should go about accomplishing that task.

IS THIS EVEN AN ISSUE? THE INEVITABILITY OF CONSTITUTIONAL EVOLUTION

As a preliminary matter, it might be argued that I have posed a nonissue in asking whether the Constitution should evolve or remain static. It could be argued that the Constitution must inevitably evolve because it is impossible to find the static meaning of a written document. The argument is that it is impossible for a contemporary Court, or any other institution, to interpret a document except from the perspective of its own society, and that the infusion of such modern perspectives, by definition, is a form of evolution. In fact, this argument also answers the second question of how evolution should occur; the process of constitutional decision making inevitably requires the Court (or other institutions) to give meaning to the document, and this process ensures evolution by interpretation. Thus, advocates of judicial activism claim that evolution by interpretation is inevitable, and it is misleading to even pose the questions as I stated them. I would welcome such a conclusion because ultimately I seek to establish that the meaning of the Constitution should evolve by interpretation, and this argument provides support without even considering the two questions I posed.

The argument that contemporary interpretation is inevitable is a strong one. It is well established that the words of a document can rarely be given determinate meaning because of the inherent vagueness and ambiguity of language.[13] Many literary critics argue that there is no correct interpretation of any text, that all

interpretations are a reflection of context and the beliefs of the interpreter.[14] Sanford Levinson explains that "all language is read against a background of . . . shared understandings, purposes, and assumptions that can, at any given instant, defeat the apparently precise ink on the page."[15] Thus, Stanley Fish argues that inherently interpretation is "not the art of construing, but the art of constructing."[16]

In fact, this is not a new argument. John Marshall expressed the same thought almost 170 years ago.

> Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in this rigorous sense, would convey a meaning different from that which is obviously intended.[17]

This indeterminacy is especially apparent in phrases like "due process of law" or "equal protection." Because, as argued in the previous chapter, the Constitution is written in general language to which almost everyone can agree, there is no determinate, specific meaning for most constitutional provisions. Even the constitutional language that appears more specific is indeterminate. For example, Justice Hugo Black often endorsed a literal interpretation of the First Amendment, declaring, "I read 'no law abridging freedom of speech' to mean no law abridging."[18] But as Owen Fiss points out, this phrase is hardly unambiguous: "Does 'speech' embrace movies, flags, picketing and campaign expenditures? What is meant by 'freedom'?"[19] Furthermore, does the language that "Congress shall make no law" mean that the executive can infringe upon freedom of speech? Similarly, when the Constitution speaks of "Commerce . . . among the several States,"[20] does that mean commerce between the states (interstate commerce),[21] or does it mean commerce among, within, the states (including interstate and intrastate commerce)?[22] Does the term *commerce* refer to all business activity or just one stage of business relating to sales, distinct from mining, manufacturing, and production?[23] A final example, and my favorite, is provided by Paul Brest: does the requirement that the president be a "natural born" citizen prohibit those born by Caesarean section from being president?[24] Or, expanding Brest's example, because the term *natural birth* has a fairly definite meaning these days, does the Constitution prevent anyone from being president whose mother received an anesthetic during childbirth? A culture that believed such individuals to be inferior obviously could interpret the language in this way.

Such constitutional provisions are the rule, not the exception. What constitutes a "declaration of war"? What are the president's powers as "Commander-in-Chief"? What is a "high crime or misdemeanor" for purposes of impeachment? What is a "republican form of government" under Article IV of the Constitution? What is the "establishment" of religion? What is an "unreasonable search and seizure"? The examples go on and on.

Decision making applying the Constitution to specific situations inevitably

requires interpretation, and interpretation inherently reflects the values of the interpreter. Thus, the two questions posed at the beginning of this chapter are answered: The Constitution, if it is to govern society, will evolve by interpretation.

Proponents of the view that the Constitution should be either static or evolve only through amendment might try to rescue their position by arguing that ambiguities in language should be resolved by recourse to the intent of the document's drafters. The method attempts to follow the traditional practice of statutory construction; that is, when the text of a statute is unclear, its meaning should be determined by the intent of the drafters as indicated by its preadoption history. According to this argument, the Constitution's meaning is limited to that which its Framers intended. Those who argue against any constitutional evolution would contend that the document's meaning is fixed at the time of its enactment, and that all application is to be governed by the Framers' purposes. Thus, modern values are irrelevant and may not be added to the document by interpretation or amendment. More commonly, the argument made is that the meaning of the Constitution is limited to what the Framers intended, and that the only legitimate form of evolution is through constitutional amendment.[25]

However, even assuming that the Framers' intent should guide modern constitutional interpretation (an issue discussed in the next chapter), there is not an unambiguous, knowable Framers' intent that can be found to resolve constitutional questions. Instead, the process of determining the Framers' intent inevitably is a process of interpretation that is affected by contemporary values. Therefore, again, it must be concluded that the Constitution will evolve by interpretation.

The initial indeterminacy problem stems from an inability to determine who the Framers were. That is, which group's intent should be authoritative in applying the Constitution? The process of ratification included not only Congress and the drafters of a provision but also the states. John Wofford explains:

> [I]f we are really searching for the states of mind of those responsible for the presence in the Constitution of a particular provision, it is hard to understand why we should be particularly concerned only with those who drafted the provision or supported it actively. Responsibility is more widely distributed; in order to become part of the Constitution, the provision had to be accepted by the Philadelphia Convention or by the Congress, and then ratified by the states acting either through legislatures or through special conventions. Yet, to admit the relevance of such a large number of states of mind is to set forth a task virtually impossible to fulfill.[26]

In other words, the interpreter must make a choice as to whose intent will count—a question for which there is no determinate, correct answer.

Furthermore, even if a particular group is chosen as authoritative for purposes of constitutional decision making, it is impossible to state the group's intent without engaging in an interpretive process. Undoubtedly, different members of

the group had varying and perhaps conflicting reasons for adopting a particular constitutional provision.[27] Some of the purposes might have been articulated, but others might not have been expressed. To decide which expressions are authoritative and which are not is, of necessity, a process of choice and interpretation. Social choice theorists demonstrate that it is usually impossible to construct a set of social preferences out of the preferences of individual members of a group.[28] Again, the conclusion is that there is not a concrete and knowable intent of the Framers waiting to be found;[29] there exists only a process of interpretation to determine meaning.

Additionally, even if the group is determined, and even if somehow a collective intent could be found, the historical materials are too incomplete as to support authoritative conclusions. Jeffrey Shaman explains that the "Journal of the Constitutional Convention, which is the primary record of the Framers' intent, is neither complete nor completely accurate. The notes for the Journal were carelessly kept and have been shown to contain several mistakes."[30] As Justice Robert Jackson eloquently remarked, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharoah."[31] For example, virtually the entire record of what occurred at the Constitutional Convention consists of James Madison's notes. William Crosskey makes a persuasive case that there is a "possibility that this testimony may have been, not inadvertently, but deliberately, false and misleading as to what the various members had said."[32]

Finally, even if all the above problems were surmounted, it is possible that the interpreter would discover that for some provisions the Framers did not have any specific intent. Especially as to the provisions written in open-textured language, it is quite likely that the Framers meant for these provisions to gain meaning from experience and application.

Thus, basing decisions on the Framers' intent does not avoid the need for interpretations, and such interpretations will inevitably be influenced by modern values and circumstances. This conclusion should not be surprising because historiographers long have recognized that "what [history] yields is heavily dependent upon the premises of its users."[33] The famous historian R. G. Collingwood, in his classic work *The Idea of History*, argues:

> History means interpretation. . . . [W]e can view the past, and achieve our understanding of the past, only through the eyes of the present. The historian is of his own age and is bound to it by the conditions of human existence. The very words which he uses . . . have current connotations from which he cannot divorce them. . . . History is what the historian makes.[34]

In other words, "history is always an interpretation,"[35] and that interpretation cannot be completed without being influenced by modern values.

My point is not, as the argument is often made, that originalism is impossible

because of these historiographical difficulties.[36] Rather, I contend that it is impossible for someone to claim that there should be an authoritative Constitution that does not evolve by interpretation. The very process of applying the Constitution of necessity requires interpretation, and that interpretation, either of the language or of the drafters' intent, will be influenced by modern values. In other words, once it is decided that a constitutions should govern—and especially a constitution written in very general language—then, of necessity, the document will evolve by interpretation. Furthermore, as will be discussed in a later chapter, the above analysis refutes any claim that originalism permits value-free interpretation or allows judges to find objective, determinate solutions to constitutional problems.[37]

It is tempting at this point to conclude that I have answered both the questions posed at the beginning of this chapter and have established that the Constitution should evolve, rather than be static, and that such evolution is inevitably by interpretation, not just amendment. Unfortunately, such a conclusion goes farther than the proof allows. All I have demonstrated is that it is impossible to have a static authoritative constitution; some interpretation, influenced by modern values, will occur. But originalists can concede this and argue that taking this as a given, whenever possible the Constitution should be given its original meaning, as that can be best determined, and such meaning should not change once found, or at least not change without constitutional amendment. For example, everyone would agree that the Framers did not intend to give Congress the power to regulate interstate radio waves because the Framers did not know that such a thing exists. Therefore, an originalist would argue that the Constitution does not authorize such regulation and that such regulation is impermissible (at least until there is a constitutional amendment). Another example: the originalist would say that although the equal protection clause of the Fourteenth Amendment is ambiguous, there is virtually universal agreement that its drafters did not have as their purpose guaranteeing equal treatment of women.

Thus, although the ambiguity might prevent determinacy in many decisions, there are some where original meaning can be established. To conclude that determinacy is usually impossible does not prove that it is always impossible. Furthermore, decision rules could be created that would result in greater determinacy. For example, it could be stipulated at the outset who will be considered the Framers and what record will be taken as authoritative and that interpretations remain fixed and cannot be overruled. Although none of these devices secure determinacy, they would reduce the indeterminacy.

Therefore, while a static Constitution, or one that evolves only by amendment, is impossible, there are still important differences between the originalist and the nonoriginalist. If the originalist and the nonoriginalist agreed that the Fourteenth Amendment did not, at its inception, apply to protect women from discrimination, the former would conclude that it is impermissible for it to apply to women today, whereas the nonoriginalist could reject that conclusion. At the very least, originalists and nonoriginalists accord the judiciary differing degrees of discretion in determining the meaning of constitutional provisions.

Accordingly, it still is necessary to address the two questions posed at the beginning of this chapter so as to choose between the differing conclusions of originalists and nonoriginalists in instances where they interpret the historical record similarly. Also, it is desirable to examine these questions because thus far I have demonstrated only that descriptively it is impossible to have a static constitution; I have not yet established that normatively it is desirable that the Constitution evolve by interpretation. It is important, however, to keep in mind constantly that the originalist cannot argue that the Constitution should be permanently fixed or unchangeable until amendment. Both originalists and nonoriginalists must accept the desirability of a Constitution that evolves by interpretation.

The Desirability of Constitutional Evolution

The first question can then be restated a bit more precisely: Should the goal be, to the greatest extent possible, a static, unchangeable Constitution, or should the goal be an evolving Constitution? I contend that achieving the purposes of the Constitution, described in the previous chapter, requires that the Constitution evolve. Although I doubt that many would argue that the Constitution should be permanently fixed and not change even by amendment, nonetheless it is useful to explore why evolution is crucial. I contend that if it is accepted that the meaning of the Constitution must evolve, then it follows—as the next chapter argues—that the Constitution must evolve by interpretation and not just by amendment. I do not ascribe to originalists the position that the Constitution is fixed and unchangeable. Many who term themselves "moderate originalists" even allow modification by interpretation. The point here is to establish the importance of constitutional evolution.

Earlier I argued that an authoritative constitution is desirable as a way to protect minorities and fundamental rights from the majority and because of the social values to having a general, unifying constitutive document. Because society changes over time, a constitution can perform these functions only if it, too, evolves. The easiest examples to support this conclusion come from the need for the Constitution to evolve in light of technological change. Technological advancements necessitate a process of constitutional evolution if the Constitution is to succeed in protecting minorities and basic rights from the majority.

For instance, if society were truly committed to a static Constitution, "cruel and unusual punishments" would be only those punishments that the Framers meant to prohibit. The Framers obviously did not intend to outlaw the use of electric shocks as a form of torture because they did not know of that form of punishment. Therefore, a static Constitution would not forbid the use of electric shocks under the Eighth Amendment's prohibition of cruel and unusual punishment. The majority of society could totally circumvent the Framers' intent of outlawing cruel and unusual punishment by simply substituting this new form of torture for that which the Framers did intend to outlaw. The result is that the goal of society protecting itself from cruel and unusual punishment at the hands of

despotic rulers is not achieved because the despots can shift to new, even worse forms of punishment not anticipated by the Framers. If the value embodied in the Constitution is to be upheld, it must evolve to include new technological threats.

The intuitive response to this argument is that cruel and unusual punishment need not be limited to the specific list of tortures the Framers knew about; the list can be expanded to include similar modern threats. However, this argument concedes the argument that I seek to establish in this chapter—that the meaning of the Constitution should evolve, that the Constitution should not be completely static. The position that the Constitution states basic concepts that contemporary society applies by using its own conceptions is one that explicitly allows the meaning of the Constitution to be adapted to modern circumstances and concerns.[38]

The example of cruel and unusual punishment is representative, not atypical. If the First Amendment is limited to what the Framers meant it to apply to, Congress could censor the broadcast media in any way it wished because the Framers did not intend to protect expression over radio and television.[39] The goal of ensuring protection of a right, freedom of speech, from the majority cannot be achieved without evolution to reflect technological change. If the Fourth Amendment is limited to what it applied to at the time of its ratification, government could use wiretapping in any way it wanted. The very values that the Constitution was intended to safeguard could be infringed upon, and the Constitution provides no protection unless it evolves.

Similarly, the institutional arrangements that the Constitution was designed to preserve would be lost without evolution. For instance, the Constitution reflects a belief that the national government must have authority to regulate commerce among the states. There is strong evidence that one of the primary objections to the Articles of Confederation, and therefore one of the main purposes of the new Constitution, was to create a national economy that the federal government could regulate.[40] However, if the Constitution's meaning was fixed at the time of its drafting, commerce cannot be deemed to include any modern method of transportation. Therefore, Congress would lack authority to regulate any commerce by motorized vehicle. In light of the obvious importance of cars, trucks, and planes to modern commerce, a truly static Constitution could not preserve the institutional arrangement that the Constitution was designed to create. Likewise, Congress would lack power to fund an air force because the Framers could not conceive of such a branch of the armed forces or even to buy computers because they were unknown at the time of ratification.

It is not just technological advances that require constitutional evolution. Changes in social arrangements and especially in social values require an evolving Constitution. A comparison of society in 1787 with that of 1987 reveals not only physical changes, but moral ones as well. One hopes that these changes reflect moral progress—that society has grown more egalitarian, more compassionate. At the very least, descriptively, basic values such as privacy and equality have somewhat different content today than they did 200 years ago. As Alisdair

MacIntyre wrote in his famous book *After Virtue*, "evaluative expressions we use have changed their meaning. In the transition from the variety of contexts in which they were originally at home to our own contemporary culture, 'virtue' and 'justice' and 'piety' and 'duty' and even 'ought' have become other than they once were."[41]

It is likely that most would agree that the meaning of particular values evolves. As such, the meaning of values in the Constitution should not be static. The Constitution should protect values that are fundamental now, not those that were important 200 years ago. In 1787, slavery was acceptable, women were disenfranchised, notions of free speech and due process were limited. Without the possibility for evolution, the Constitution would be confined to anachronistic beliefs. If the Constitution does not evolve, it will contain values that are universally rejected by society. A document that sanctions slavery and counts a slave as only three fifths of a person for purposes of representation would be repugnant in modern society. The Constitution cannot serve as a unifying document if it contains provisions that the vast majority of society deem unacceptable.

Likewise, over time society may be concerned with the need to protect additional groups that it previously had discriminated against. U.S. society originally excluded women from virtually all aspects of civic life: women could not vote; married women could not own property or hold public office.[42] Social values have evolved, and if the Constitution is to achieve its goal of protecting minorities from the majority, there is a need for the Constitution to evolve to protect additional groups from the majority.[43] There must be some way for the Constitution to evolve to reflect contemporary moral judgments that particular groups are in need of protection from social majorities.

Finally, moral evolution requires the protection of additional rights deemed fundamental. The goal of a constitution is to protect fundamental rights from the majority. The list of rights deemed fundamental will change as morality evolves and society changes. For example, privacy might come to be regarded as fundamental and needing of protection. If the Constitution is to serve its purpose of protecting fundamental rights, it must be able to evolve to include this value.[44] Nor does it respond to this point to say that society can protect a right by statute if a majority come to regard it as fundamental. If a right is regarded as being as important as those protected in the Constitution, society will want to include it in the Constitution so as to protect it from future infringements. Again, the conclusion is that the Constitution must be amenable to change.

I am not arguing at this point that the Constitution should be *interpreted* to include modern values. The proper manner of evolution, be it by interpretation or amendment, is addressed in the next chapter. The point here is just that constitutional evolution is required if the Constitution is to succeed in its objective of protecting minorities and their rights and if it is to serve as a unifying document.

I recognize also that there is a danger that constitutional evolution could undermine the protection of minorities, rights, and the structure of government.

The opportunity for evolution risks releasing the bonds of pre-commitment that a constitution provides. There is no reason to assume, absent justification, that evolution will necessarily be positive and not negative.

Yet, the point of the above discussion was that absent evolution the Constitution will not succeed in achieving its purposes. Evolution, although risking greater harm, also offers the possibility of success. Later, in Chapter 6, I explain why, over the long term, changes will more likely be positive than negative.

There is another argument that achieving the goals of the Constitution requires evolution. If the Constitution cannot evolve, at some point it will become so outmoded that it will be completely discarded and a new constitution written. An evolving document can adapt. The clearest example of this is that our society continues to be governed by a constitution written for an agrarian slave society. If the Constitution cannot adapt by evolution, it will become progressively less relevant and even more objectionable. A nonevolving constitution will not protect the values or the minorities that the current society cares about. A nonevolving Constitution imposes values thought to be outdated and repugnant to society, such as racist and sexist values. As a result, at some point there will be demands for a new constitution.

The fight over whether and when to rewrite the Constitution will be divisive, as those who are benefiting from the current Constitution will oppose change. Instead of the Constitution functioning as a unifying document, it will be the center of disagreement. Furthermore, the process of drafting a new constitution means that the current majority is writing the document that will govern its society. The majority therefore might write a document that provides it benefits, and the Constitution is then less effective in restraining contemporary majorities and protecting minorities. A constitution that is frequently replaced is less able to serve as a stabilizing force and as a unifying symbol.

An evolving document is preferable because it allows society to undo its mistakes, rather than be permanently governed by them. For instance, early in U.S. history it was decided that the Constitution's method of electing the president and vice president was undesirable; that it was not wise for the vice president to be runner-up in the election for president. An evolving Constitution allowed for the Twelfth Amendment to correct this error in drafting. Likewise, an evolving Constitution can correct what are perceived to be errors in the interpretation that inevitably must occur. An early Supreme Court decision held that Article III of the Constitution permitted states to be sued by residents of other states.[45] The Eleventh Amendment, prohibiting federal court suits against states by citizens of other states or foreign countries, was added to the Constitution to overturn the earlier Court decision.[46] If the Constitution could not evolve, society would be governed by what it overwhelmingly deemed to be an incorrect decision. Although, of course, it must be recognized that evolution risks bad changes. However, the difficulty of constitutional amendments makes it relatively unlikely that many will be added to the Constitution. Historical experience shows that relatively few

(perhaps only the prohibition amendment) have been regarded as undesirable. Moreover, in Chapter 6 I explicitly consider why society has relatively little to fear from evolution by judicial interpretation.

All this establishes that it is desirable, even essential, that the Constitution be amenable to some form of change. Originalists cannot argue against this conclusion, at least in the context of the current debate. Recall that the originalists' major premise is that decisions in a democracy should be made by majority rule. If the Constitution cannot evolve, then the majority of society has no ability whatsoever to govern itself in areas where the Constitution regulates. A permanent, unalterable constitution exacerbates the countermajoritarian difficulties of having a constitution. If there is no evolution, current majorities are confined to be ruled by the past. An originalist who starts with the premise of majority rule would have to reject a constitution that is incapable of evolution.

Thus, it is imperative that the Constitution evolve. This conclusion is particularly important because of its relevance to the next question: How is such evolution best accomplished?

4 Should the Constitution Evolve by Interpretation or by Amendment Only?

The analysis thus far has demonstrated that many aspects of the current debate between originalists and nonoriginalists are useless in providing a basis for choosing between these competing paradigms of constitutional decision making. For example, the argument that constitutional decision making must be consistent with majority rule, the primary argument offered in favor of originalism,[1] is based on an incorrect definition of democracy. Furthermore, because both originalist and nonoriginalist judicial review are antimajoritarian, the principle of majority rule provides no basis for choosing between the paradigms. Similarly, it has been demonstrated that the claim that originalism is value neutral is incorrect because originalism inevitably is indeterminate and allows the interpreters' values to influence the decision-making process.[2]

What, then, is the real difference between originalists and nonoriginalists? When all the misleading claims are brushed aside, the key distinction is that originalists believe that the meaning of the Constitution should be changed only by amendment, whereas nonoriginalists permit meaning to evolve by interpretation. Of course, what was established at the beginning of the previous chapter must be emphasized again: the process of giving meaning to specific provisions and applying the Constitution under an originalist approach would inevitably require interpretation that would be influenced by modern values. Taking this as a given, the question is, When the meaning of a constitutional provision is identified, can that meaning be changed by interpretation or is the meaning fixed until a constitutional amendment is enacted?

Originalists such as Raoul Berger, Robert Bork, and William Van Alstyne explicitly state that they believe that amendment is the only legitimate means for constitutional evolution.[3] These commentators argue that the Constitution cannot be deemed to protect a particular right unless it is clear that the Constitution's

drafters intended to protect such a right. Judge Bork, for example, writes that "where the constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other."[4] In such instances the Constitution should be regarded as providing no answers to the constitutional question, and the matter left to the majority of society to resolve as it deems appropriate.

In a recent article, William Van Alstyne develops a similar originalist argument.[5] Van Alstyne argues that constitutional decision making should be governed by Justice Owen J. Roberts's famous statement in *United States v. Butler*:

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.[6]

Van Alstyne argues that unless it is clear that a specific matter does not square with the Constitution, it should be regarded as constitutional.[7]

Therefore, commentators such as Judge Bork and Van Alstyne take the position that the Constitution only applies to that which it was originally intended to include. Nothing else violates the Constitution until and unless the document is amended. So, for example, if it is clear that the Framers of the Fourteenth Amendment did not intend to guarantee equality for women, it is illegitimate to apply the equal protection clause to invalidate gender classifications. From the originalist perspective, only a constitutional amendment could impose a constitutional limit on sex-based discrimination.[8]

Similarly, if there is no clear intent of the Framers to desegregate schools or protect the right of women to have access to contraceptives or abortion, the Constitution does not justify decisions invalidating laws segregating schools or prohibiting abortions.[9] Unless the Framers intended to outlaw a practice, the Court has no authority to declare legislative or executive acts unconstitutional, and the legislature and executive can implement their policies without concern that they are violating the Constitution. Again notice that although originalists usually state their conclusions in terms of judicial powers, constitutional decision making is engaged in by all branches and levels of government. The question of which branch of government should be the ultimate arbiter of the meaning of the Constitution is a distinct question that is addressed in the next chapter.

In contrast to the originalists, nonoriginalists believe that the Constitution's meaning is not limited to what the Framers intended; rather, the meaning and application of constitutional provisions should evolve by interpretation.[10] Nonoriginalism allows constitutional interpretation to include norms and values not expressly intended by its Framers. The fact that the Framers did not intend to prohibit gender discrimination or apply the Bill of Rights to the states is irrelevant to the nonoriginalist in deciding what the Constitution means.

Hence, the key difference between the originalist and the nonoriginalist is

whether the Constitution should evolve only by amendment or whether it should also be capable of change by interpretation. This central question has received little direct attention because the debate over constitutional interpretation has focused on misleading questions, such as whether nonoriginalism can be reconciled with majority rule.

Actually, the above discussion is somewhat misleading because there are not only two choices in constitutional interpretation: originalism and nonoriginalism. Originalism, as it is described above, is a rather extreme position and many who call themselves originalists take a more moderate approach, allowing some evolution by interpretation. Likewise, there are many different nonoriginalist theories; a point developed in detail in Chapter 6. Yet, because so much of the debate has been framed in originalist, nonoriginalist terms, it is worth analyzing these paradigm models before considering alternatives.

The analysis in this chapter is divided into three major sections. The first considers the arguments that have been advanced in favor of originalism and explains why they are inadequate. The second section presents a normative justification for why the Constitution must evolve by interpretation if it is to achieve the purposes of a constitution described in Chapter 2. Finally, the third section considers ways in which originalists might try to rescue their paradigm, especially by changing it to allow room for evolution by interpretation. This final section examines in detail the less extreme versions of originalism, such as "moderate originalism," which allow for some evolution by interpretation.

THE ORIGINALISTS' ARGUMENT

To the extent that there has been any discussion of the question of whether evolution should be by amendment or interpretation, originalists have tried to argue that their position is true by definition. They have claimed that it is inherent to a written document that any changes must be brought about by amendment.[11] Such an axiomatic approach is unpersuasive and inadequate because there is nothing inherent to the Constitution that says anything about how its meaning should evolve.

The current debate is a dispute between two major alternative ways for giving a constitutional provision meaning: one focuses on the original intent of the provision (to the extent that such intent is knowable); the other allows the Court to interpret the provision from the perspective of modern values. Again using the example of gender discrimination and the equal protection clause, one view is that the equal protection clause does not apply to sex-based classifications because the Framers did not intend such application; the other view is that it can be applied to gender classifications because of current judgments about the inappropriateness of sexism. Certainly, either side can claim that it provides the true and correct way to understand the Constitution. What is needed are arguments as to which is the preferable method for interpreting the Constitution. There is nothing inherent to the Constitution that answers this question, and it is simply question begging and

poor argumentation to claim that either approach is a priori true. The defense of either approach requires normative arguments; neither side can win by stipulation. Larry Simon explains: "There is no intrinsically legal or constitutional answer to the question how should the Constitution be interpreted. The evaluative standards must come from the external perspective of political and moral theory."[12]

To illustrate how much the defense of originalism has featured question begging, consider the arguments of a number of prominent originalists. Henry Monaghan argues, for example, that the process of interpretation requires that the purposes of a document's drafters have authoritative status. Monaghan writes:

> A distinction is sometimes posited between textual analysis and original intent inquiry such that only the constitutional text and not parole evidence can be examined to ascertain constitutional meaning. But any such distinction seems to be entirely wrong. All law, the Constitution not excepted, is a purposive ordering of norms. Textual language embodies one or more purposes, and the text may be understood and usefully applied only if its purposes are understood. No convincing reason appears why purpose may not be ascertained from any relevant source, including its 'legislative history.'[13]

The problem with Monaghan's argument is that he assumes that the purposes that motivated a provision are authoritative and then simply argues that the Framers' intent is controlling because it is evidence of purpose. But the entire question is whether, in constitutional interpretation, the goal is to find the intended purposes behind a provision or whether modern society can supply its own meanings and purposes. In other words, Monaghan is correct that the Framers' intent is relevant if the goal is to find original purposes. This argument, however, begs the key question of whether originalism or nonoriginalism is the appropriate paradigm —that is, whether the Constitution is limited to the Framers' intent until it is amended or whether modern society can interpret provisions from its own perspective.

Phrased slightly differently, there are at least two ways to view the Constitution's language. One way is to conclude that a constitutional provision must be given its original meaning until it is amended. The other way to interpret a provision is to construe its language without reference to the Framers' intent, allowing it to evolve based on modern applications of the Constitution's values.[14] From this perspective, the language of the Constitution is a vessel that can be filled with new meanings through interpretation. The difference between these two approaches is the choice between originalism and nonoriginalism. Monaghan offers no reason why the former is preferable.

Another example of argument from definition is the contention of Walter Benn Michaels that "any interpretation of the Constitution that really is an interpretation of the Constitution . . . is always and only an interpretation of what the Constitution originally meant."[15] Michaels concludes, based on his definition of the term *interpretation*, that "there is no such thing as non-originalist modes of interpretation."[16] Michael's argument is simply a tautology: he defines *inter-*

pretation as requiring originalism and therefore concludes that only originalism is a legitimate method of interpretation.

Nor is there any reason to accept Michaels's definition unless he provides a normative defense for that method of constitutional decision making. He does not explain why his definition of *interpretation* is preferable to a definition that says that *interpretation* is the process of giving meaning to a provision based on modern values. Michael Perry makes exactly this point in response to Michaels.

> But why should we accept [Michaels's] . . . stipulation? As a matter of ordinary language, 'interpretation' has no single, canonical meaning. Like many other words, 'interpretation' is used in more than one way. The search for what the author intended is one sense, but not the only one.[17]

If Michaels is making an argument about how the Constitution should be given meaning, he must develop a normative argument; he cannot establish the proper methodology by definition.

It is possible that Michaels is making a much more limited point that nonoriginalism should not be termed *interpretation*, as that term usually connotes a process of finding authorial intentions. If this is what Michaels is saying, he is not making an argument against nonoriginalism; rather, he is only saying that for the sake of clarity nonoriginalism should be termed something other than *interpretation*, such as " 'constitutional application' or 'evolution' or 'extrapolation' or 'meaning giving.' "[18] Although other literary critics challenge Michaels's restrictive definition of *interpretation*,[19] the key response is that the choice of terminology is completely irrelevant. Regardless of what the process is called, what matters is whether the Constitution can evolve other than by amendment, and this question cannot be answered except by developing normative arguments.

Yet another example of a tautological defense of originalism is Edward Melvin's recent claim that the oath of office that judges take compels them to follow an originalist methodology.[20] Melvin writes that "when a judge takes his oath to uphold the Constitution he promises to carry out the intention of the framers."[21] Taken literally, this statement is incorrect: judges, like all public officials, only swear to uphold the Constitution; judges do not take an oath to any particular view of constitutional decision making.[22] The oath of office only can be viewed as mandating originalism if a normative argument is made that judges uphold the Constitution only if they are originalists in their decision making. Melvin offers no such argument as to why constitutional evolution by interpretation should be viewed as inconsistent with the oath of office. Melvin's argument is a tautology: he defines the oath of office as requiring originalism, and on the basis of his definition, he concludes that nonoriginalism is impermissible.

Perhaps the most important example of question begging by originalists is their attempt to invoke the Framers' intent as a justification for originalism. Raoul Berger, for example, argues that the Constitution's meaning must remain static until there is an amendment because that is what the Framers intended in drafting

the Constitution. Berger states, "The Framers did not leave us in the dark on this score; by Article Five they confided the power to amend to the people and not to the judges."[23] Similarly, Judge Bork argues that the meaning of the Constitution cannot be changed by evolution because "not even a scintilla of evidence supports the argument that the framers and the ratifiers of the various amendments intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government. . . . If the framers really intended to delegate to judges the function of creating new rights by the method of moral philosophy, one would expect they would say so."[24]

This argument is circular. It says that the Framers' intent is authoritative because the Framers intended their intent to be authoritative.[25] Because the difference between originalism and nonoriginalism is whether the Framers' intent is controlling until the Constitution is amended, it is question begging to try to resolve the issue by looking to the Framers' intent. To avoid circularity, there must be some substantive theory, some normative argument, justifying why it is appropriate to interpret the Constitution according to the Framers' intent.

Furthermore, there is strong evidence that Raoul Berger and Judge Bork are incorrect—that the Framers did not intend their intent to be controlling. Many scholars have argued persuasively that in choosing to write the Constitution in general language the Framers meant for the Constitution to evolve via interpretation and to "gather meaning from experience."[26] For example, Gerald Lynch concludes that "the framers of particular constitutional provisions intended to leave particular questions of interpretation for future development by the courts."[27]

An examination of the Framers' jurisprudence further supports the view that they expected the meaning of the Constitution to evolve. The Framers believed that individuals possessed natural rights, and that the purpose of government, as expressed by John Locke, was to protect the rights that individuals possessed in the state of nature.[28] The Framers did not see it as necessary to enumerate the rights they believed to be natural.[29] The Framers recognized that courts would articulate natural law principles in the process of deciding cases. Robert Clinton explains that "the articulation of concepts of natural law rested principally with the judges. As seen through [the Framers'] . . . eyes, the judges of the day were 'discovering' natural law."[30] Thus, the Constitution's protection of natural rights was intentionally left vague, and it was knowingly left to the judiciary to specify the particular meaning of the rights.

In a recent article titled "The Original Understanding of Original Intent," H. Jefferson Powell demonstrates that the Framers did not intend their views to control future constitutional interpretation. Powell concludes:

> It is commonly assumed that the 'interpretive intention' of the Constitution's framers was that the Constitution would be construed in accordance with what future generations could gather of the framers' own purposes, expectations, and intentions. Inquiry shows that assumption to be incorrect. Of the numerous hermeneutical options that were available in

the framers' day—among them the renunciation of construction altogether—none corresponds to the modern notion of originalism.[31]

At the very least, this undermines the originalists' tautological claim that the Framers' intent should be followed because they intended their intent to be followed. More important, if it is true that the Framers intended for the Constitution's meaning to evolve, then originalism self-destructs as a method of constitutional decision making. Originalism requires that the Constitution be interpreted in accord with the Framers' intent. Therefore, if the Framers intended that subsequent generations use a model other than originalism, the originalists' premise forces them to abandon their theory.[32]

My major point thus far has been that most of the defenses of originalism have been tautological and question begging. This is not to say that nonoriginalism is preferable, only that choosing between originalism and nonoriginalism requires a normative analysis of whether the Constitution should evolve by interpretation or only by amendment. Originalists have avoided making such normative arguments; instead, they have attempted to prove their case by definition and stipulation.

There are two other arguments frequently made for originalism that deserve consideration; both are descriptive statements masquerading as normative arguments. First, originalists frequently conclude that their theory is correct because the Supreme Court frequently speaks in originalist terms, actively looking to the Framers' intent.[33] This, of course, is only a description of Supreme Court decision making; it says nothing normatively about the desirability of such an approach. If, however, the originalists were to convert this into a normative argument and contend that for some reason the past method of constitutional decision making should be followed, then the originalists would concede the entire debate to the nonoriginalists because throughout U.S. history the Supreme Court has accepted nonoriginalism.

In numerous decisions, the Court has expressed its rejection of originalism. For example, in *United States v. Classic*,[34] the Court stated:

> [In deciding] whether a particular provision of the Constitution applies to a new subject matter it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses.[35]

Similarly, in *Home Building and Loan v. Blaisdell*,[36] the Court denounced the view that the Constitution is limited to what the Framers intended.

> It is no answer to say that this public need was not apprehended a century ago, or to insist that what the provision meant to the vision of that day it must mean to the vision of our time. If by the statement that what the Constitution meant at the time of its adoption it

means today, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. It was to guard against such a narrow conception that Chief Justice Marshall uttered the memorable warning—'We must never forget that it is a Constitution we are expounding.'[37]

It is hard to imagine a clearer rejection of originalism.

Similarly, in *Brown v. Board of Education*, the Court observed: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written."[38] The Court was even more explicit in rejecting originalism as a method for interpreting the Fourteenth Amendment when it stated in *Harper v. Virginia Board of Elections*:

> [T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are constitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limit of fundamental rights. Notions of what constitutes equal protection for the purposes of the Equal Protection Clause *do* change.[39]

The Court has stated frequently that a nonoriginalist methodology is essential in constitutional decision making. Justice Byron White, for example, once remarked:

> [T]he Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done today is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed this is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.[40]

Nonoriginalism is not a new paradigm. For example, H. Jefferson Powell observes that the Supreme Court's decision in 1973, in *Chisholm v. Georgia*, permitting states to be sued in federal courts, could not be justified under an originalist methodology. Powell remarks that "[i]f the Court had regarded itself as bound by the expectations of the Constitution's framers and supporters, a decision in Georgia's favor would have been warranted."[41] More dramatically, *Marbury v. Madison* is regarded by most commentators as a nonoriginalist decision because the Constitution is silent about judicial review and the Framers' intent is ambiguous at best.[42] There are numerous examples of nonoriginalist decisions throughout the nineteenth century.[43] During this century, almost every major Supreme Court decision, from the repudiated doctrines of the Lochner era through the decisions of the Warren and Burger courts, has been nonoriginalist in its methodology.[44] Jeffrey Shaman expresses it well: "Notwithstanding the ortho-

dox protestations that it is illegitimate for the Court to 'revise' or 'amend' the Constitution, this is in fact what the Court always has done by continually creating new constitutional meaning.''[45]

I am not arguing that this description of the Court's constant nonoriginalism answers the normative question of which paradigm is most desirable for constitutional decision making. Instead, the point is that originalists are plainly wrong when they claim that the Court's occasional originalist rhetoric implies a rejection of nonoriginalism.

The fact that the Court embraced nonoriginalism in its decisions has relevance in choosing between the paradigms only to the extent that knowing current practices determines who has presumption and who has the burden of proof in the debate.[46] In choosing between originalism and nonoriginalism, it is important to keep in mind that this is 1987 and not 1787. The Court does not have the luxury of writing on a blank slate, and any shift in theories of judicial review involves costs. If earlier decisions are inconsistent with the prevailing theory, they can be overruled, but stare decisis will be sacrificed and doctrinal instability will be common. On the other hand, if earlier decisions are allowed to stand, under the new theory the Court might not adhere to them, thus creating inconsistencies in the law.[47] For example, what happens to the right to privacy if a theory is adopted under which the Court cannot protect this right?[48] Are earlier decisions protecting privacy overruled? Or is the right preserved but not applied in future cases, in which case inconsistency is inevitable? This is not to say that the Court is obligated to follow the theory that it has used primarily thus far.[49] Rather, because there are costs in shifting paradigms, a presumption exists in favor of the theory—nonoriginalism—practiced for almost 200 years.

At the very least, this is important rhetorically because thus far in the debate over constitutional interpretation, originalists have presented themselves as advocating the traditional method of decision making and have described nonoriginalists as the challengers who must bear a heavy burden of proof. Nonoriginalists have wrongly been placed on the defensive. It is originalists who are arguing for a major change in the interpretive methodology.

One final argument offered by originalists in favor of their paradigm needs to be considered. Many originalists argue that the fact that the Constitution specifies a procedure for amendment mandates that constitutional evolution occur only through the amendment process.[50] For example, one originalist commentator recently remarked: ''Since the Constitution provides the formal amendment process, to the extent that it remains unamended, it must be interpreted in the original sense.''[51] Correctly put, the issue is whether 200 years of nonoriginalism should be abandoned and originalism adopted as the only legitimate model of constitutional interpretation.

However, the existence of a provision creating a procedure for amendments does not by itself reveal anything about when that procedure should be used or whether the procedure is the exclusive method of constitutional interpretation. A normative argument must be made as to why the existence of an amendment

process in the Constitution means that nonoriginalism is illegitimate. No such argument has been presented yet.

I imagine that the claim would be that each part of the Constitution must be interpreted to have independent significance, and any view that makes a provision superfluous is incorrect. The originalist would then claim that nonoriginalism renders the amendment process unnecessary and therefore nonoriginalism is incorrect. There are two major problems with this argument. First, again, it is arguing entirely from a stipulation: why is redundancy to be avoided? To the extent that constitutional evolution is desirable, as demonstrated in the previous chapter, it is advantageous to have multiple, different mechanisms to accomplish change.

Second, the originalists' argument based on the amendment clause is defeated if the amendment process has an independent function under nonoriginalism. If the amendment process accomplishes something that cannot be attained solely by interpretation, then it is not redundant, and nonoriginalism is, by this argument, acceptable. Under nonoriginalism, the amendment process serves as a way to reverse Supreme Court decisions that are viewed by an overwhelming majority of society as unacceptable. In U.S. history the Constitution has been amended four times to overturn Supreme Court decisions.[52] The amendment process can also function to change the procedure of government in situations where the Court has no basis for imposing such modifications by interpretation. For example, the Twenty-second Amendment limits the president to two terms of office, and the Twenty-third Amendment provides the District of Columbia with representation in the Electoral College. It is likely that neither of these changes would have been accomplished through interpretation.

Additionally, the amendment process serves an important independent function of providing symbolic reinforcement of those new matters placed in the Constitution. Constitutionalizing specific values has enormous effect in reinforcing those norms and communicating their importance to society. For example, the post–Civil War amendments prohibiting slavery, ensuring that the states provide equal protection and due process to their citizens, and guaranteeing the right to vote had substantial symbolic effect.

Nonoriginalism does not render the amendment process superfluous. The Constitution's detailing of the procedure for amendments therefore provides no basis for choosing between originalism and nonoriginalism.

Thus far, I have demonstrated only the inadequacy of the traditional defense of originalism. The next step is to present an explanation as to why the Constitution should evolve by interpretation and not just by amendment.

WHY THE MEANING OF THE CONSTITUTION SHOULD EVOLVE BY INTERPRETATION

The Constitution can achieve its purposes, as described in Chapter 2, only if it can evolve by interpretation. If the Constitution is static until amended, as

originalists argue, it will fail to provide an adequate check on the majority and it will fail to provide a unifying symbol for society.

Constitutional Evolution Via Interpretation

The previous chapter demonstrates why it is essential that the Constitution evolve in order to achieve its objectives. Constitutional evolution requires change by interpretation; to say that the Constitution may be modified only by amendment is to say there will be virtually no evolution. The cumbersome amendment process, requiring approval by two thirds of both houses of Congress and three quarters of the state legislatures, makes it likely that few amendments will be added to the Constitution. Just 16 amendments have been added in almost 200 years. This means that the Constitution will remain virtually static, failing to evolve to meet the needs of a society that is advancing technologically and morally.

In fact, originalists even admit that the complex amendment procedure makes it highly unlikely that the Constitution will be amended. When the argument is raised that the judiciary's powers are checked by the amendment process, the traditional response of originalists is that this is insufficient because amendments are unlikely and rare. Stephen Carter, who espouses an originalist approach to at least part of the Constitution, recently stated, "In the 1980's, Article V is very nearly a dead letter. The contention that it provides a realistic check on judicial activity is at best wishful thinking, certainly somewhat naive, and at worst disingenuous."[53] Putting aside for the moment the question of whether the amendment process is an adequate check on the judiciary, originalists recognize the near impossibility of amendments. Therefore, a constitution that evolves only by amendments rarely evolves. The conclusion reached in Chapter 3 that evolution is essential dictates the rejection of originalism.

More specifically, the previous chapter argued that unless the Constitution evolves, it will not protect minorities and their rights adequately, and it will not serve to unify society. A few examples illustrate this conclusion and therefore the unacceptability of originalism. For instance, how would an originalist deal with Article II of the Constitution, which refers to the president as "he"?[54] The Framers intended that the president would be male and in fact excluded women from all political participation.[55] Thomas Jefferson once remarked that "were our state a pure democracy there would still be excluded from our deliberations women, who, to prevent deprivation of morals and ambiguity of issues, should not mix promiscuously in gatherings of men."[56] Thus, an originalist interpreting Article II would be compelled to declare unconstitutional the election of a woman as president or vice president until the Constitution was amended.[57] Both the language of the text and the Framers' intent makes clear that the president was intended to be male. If the Constitution were not amended to reflect society's current values—either because it did not occur to people to amend Article II or because such an amendment was politically impossible[58]—then the election of a

woman as president or vice president would be unconstitutional. The Constitution would hardly be serving its purpose of protecting a group traditionally discriminated against, and the Constitution's ability to unify society would obviously be undermined, if society were denied its choice for president or vice president.

This example, while dramatic, is not atypical. Under an originalist approach, the federal government would not be under any obligation to treat citizens equally. The equal protection clause of the Fourteenth Amendment only applies to the states.[59] No provision of the Constitution required the federal government to provide equal protection of the laws. The Supreme Court circumvented this limitation by interpreting the due process clause of the Fifth Amendment to impose a requirement that the federal government provide equal protection.[60] This conclusion, however, is nonoriginalist because it is supported by neither the text nor the Framers' intent. The Fourteenth Amendment includes both a due process clause and an equal protection clause. An originalist, therefore, would believe that these clauses have separate meanings. Moreover, there is no indication that the Framers, in drafting the Fifth Amendment, intended it to create a requirement for equal protection.[61]

The conclusion is that under an originalist approach, until the Constitution is amended the federal government could discriminate in almost any way it wanted. The Constitution would not serve its goal of protecting minorities if the federal government were unconstrained by considerations of equality. Moreover, the Constitution would not serve a unifying function if the federal government were allowed to discriminate and the states were prohibited from acting in the identical manner.

The examples are endless. Unless the First Amendment were amended, the president could suppress speech because the First Amendment only says that Congress may make no law. Similarly, Congress could censor speech on radio and television because there was no Framers' intent to apply the First Amendment to these media.

These examples demonstrate that the Constitution must evolve and that interpretation provides a means for the necessary evolution. By interpretation the Court can declare that "he" in Article II should be regarded as a generic reference to all humans and the election of a woman is constitutional. By interpretation the Court can hold that the Fifth Amendment imposes a requirement of equal protection on the federal government. By interpretation the Court can rule that the president must obey the First Amendment and that the broadcast media is protected by the Constitution.

Originalists could respond that there is no inherent reason why the Constitution could not be amended to achieve these results. Certainly, in theory, the Constitution could be amended; however, the relative unlikelihood of amendment makes it inferior as a process of evolution. For example, often the nature of the subject matter makes it unlikely that amendments would be enacted. It is highly unlikely that state legislatures would have approved a constitutional amendment to reapportion state legislatures.[62] Nor is it probable that the legislatures would have

approved amendments to apply the Bill of Rights to the states[63] or to desegregate the schools.[64]

Moreover, evolution by amendment is inferior because it is unlikely that society would be willing to devote the energy and resources to amend the Constitution constantly. If all evolution were by amendment, frequent amendments would need to be added to the Constitution. All the examples mentioned thus far, and innumerable more, indicate the large number of places where the Constitution would have to be amended to reflect changes in society. But the cumbersome nature of the amendment process, and the need for approval from so many different institutions, makes it highly unlikely that very many amendments would be ratified. In short, once it is established that the Constitution must evolve, then it follows that evolution should occur through interpretation and not just through amendment.

Furthermore, if amendments were made frequently, the Constitution would lose its symbolic value as a brief, abstract document. If amendments were routine and not exceptional, there is reason to fear that precisely when it matters most, constitutional protections might be eliminated by amendment.

Protecting Minorities and Rights

A second major argument as to why the Constitution should evolve through interpretation is that protection of minorities and their rights requires it. Chapter 2 established that one of the primary purposes of a constitution is to safeguard minorities from the powers of the majority. Chapter 3 established that technological advances often pose new threats to rights, and moral progress creates concerns for new minorities and new rights. If amendments were the only way to change the Constitution, protection against new threats and protection of new minorities and of new rights would require action by a supermajority of the society. In other words the minority would be protected from the majority only if a supermajority of society decided to act. Such a requirement means virtually no protection at all.[65]

Consider a simple example. Social changes made education increasingly important during the twentieth century. Few would doubt that if blacks are to achieve true social equality, education is essential. Nor would many deny that the Jim Crow laws that segregated the South, including its schools, were based on an assumption of the inferiority of blacks.[66] Therefore, equal protection for a crucial minority (both in numerical size and in moral terms, given the history of slavery) required provision of quality education and the elimination of segregation. The Constitution would fail one of its most important purposes if it did not provide this protection for blacks.

However, it is highly improbable that the Constitution would have been amended to declare separate but equal schools unconstitutional or to eliminate the Jim Crow laws. Neither Congress nor the requisite number of states likely would have ratified such amendments. It is highly unlikely that Congress would have

enacted legislation to desegregate the South pursuant to its authority under section 5 of the Fourteenth Amendment. Southern senators and representatives had disproportionate influence in Congress, especially during the 1950s and 1960s and likely could have blocked any amendment. During this time, virtually all congressional committees were chaired by southerners, who generally served longer terms because the South was controlled largely by one political party.[67] Given their influence in Congress, and congressional procedures that gave great power to committee chairs, southerners were in a position to prevent any amendment. There is no doubt that they would have used all their influence to thwart an amendment ordering desegregation. In 1956, 96 southern congressmen issued a declaration denouncing the Supreme Court's decision in *Brown v. Board of Education* and calling on their states to "resist forced integration by any lawful means."[68]

Moreover, it is unlikely that states would have ratified such an amendment even if Congress had managed to pass it. Because more than a quarter of the states had laws segregating their schools,[69] it is improbable that three quarters of the states would have voted for an amendment ending segregation. As Edmund Cahn remarked, "As a practical matter it would have been impossible to secure adoption of a constitutional amendment to abolish 'separate but equal.' "[70]

The Constitution needed to evolve to protect blacks and especially to eliminate segregated schools. Evolution only by amendment would not have eliminated segregation. Generally stated, it makes no sense to protect minorities only if a supermajority of society acts. If the Constitution is to achieve its goal of protecting minorities and their rights, it must evolve by interpretation, not just by amendment.

In fact, protecting the value of majority rule and the rights of the majority also justifies constitutional evolution. A powerful example of this is reapportionment. Until the Supreme Court's reapportionment decisions in the 1960s, most state legislatures were malapportioned, giving undue voting strength to rural areas and inadequate representation to more populous areas. It is unlikely that the political process would have corrected this. Those in power as a result of malapportionment were unlikely to vote themselves out of office by redistricting. Only the judiciary, with its power to interpret the Constitution, could remedy this problem.

Preserving the Constitution as a General, Unifying Document

A third major reason why the Constitution should evolve by interpretation is to preserve the Constitution as a general, unifying document. Assuming that I am wrong, and amendments can be added to the Constitution easily, then there would be countless amendments. Article I of the Constitution would need to be amended to give Congress power to regulate modern means of commerce. Article II would need to be amended to specify the president's powers to remove Cabinet officers, recognize foreign governments, and invoke executive privilege, to give just a few examples.[71] The First Amendment would need to be amended to protect television and radio broadcasts from censorship. The Fourth Amendment would need to be

amended to limit wiretapping. The Fifth Amendment would need to be amended to prevent coerced confessions and ensure provision of counsel for indigents. The Sixth Amendment would need to be amended to solve the problem of prejudicial publicity, which the Court has tried to handle through interpretations.[72] The Eighth Amendment would need to be amended to prohibit modern forms of torture. The Fourteenth Amendment would need to be amended to ensure equal protection to women, aliens, illegitimate children, and other groups not intended to be protected by the amendment's Framers.[73] Amendment would be necessary to apply the Bill of Rights to the states. The Constitution would have to be amended to protect the right to privacy, the right of parents to control the upbringing of their children, and the right of family autonomy.[74] And this list is only the beginning, a few examples from an almost endless list.

As the Constitution becomes filled with these innumerable amendments, it would lose its value as a general, constitutive document. The more specific the document, the less it could serve as a unifying device for society. When a controversial constitutional decision is made through interpretation, those who disagree with the result can view their loss as hopefully temporary and look forward to reversal in future interpretations. But if the result is enshrined in the Constitution, the chances of change are much less. The unifying value of the document is lost as it contains more and more specific provisions with which some people disagree. Moreover, if the proposed amendments were rejected, the affected group would feel alienated and hopeless. The majority of society publicly decided that the losing group was not deserving of constitutional protection. As this process repeatedly occurred, an increasingly large segment of society would become disgruntled. By contrast, when losses result because of interpretations, it is less of a message of rejection from society and there remains the hope of winning through future changes in interpretations.

A relatively short, general document accomplishes a constitutive function much better than a lengthy, detailed one. People can comprehend a shorter document better, and feel more allegiance to it, than a very long text. John Marshall observed that a Constitution with the "prolixity of a legal code . . . could scarcely by embraced by the human mind. It would probably never be understood by the people."[75] As discussed in a previous chapter, because of their greater degree of detail, state constitutions engender much less respect than does the more general national document. Joseph Long remarked:

> The federal constitution . . . has happily escaped the fate that has befallen the constitutions of the states. Not only are they subject to constant change, but they have long since ceased to be constitutions in a true sense. Instead of embodying broad general propositions of fundamental permanent law, they now exhibit the prolixity of a code and consist largely of mere legislation. No one now entertains any particular respect for state constitutions. It has little more dignity than an ordinary act of legislation.[76]

Laurence Tribe similarly remarked how the "cluttered" nature of state constitutions explains why "they rarely command the respect routinely paid to federal constitutional guarantees."[77]

Preserving a relatively short, general document requires that evolution occur by interpretation. If changes could come about only via amendment, and if amendments did occur, the document would grow enormously in size and specificity. A primary value of the Constitution, as explained in Chapter 2, would be lost.

Interpretation Best Achieves Constitutional Evolution

A fourth major reason why originalism is undesirable is that evolution by interpretation allows experiments, facilitating change and minimizing the risk of errors. Even assuming that both interpretation and amendment could provide the necessary evolution, interpretation is a preferable method of change. If a result attained by interpretation proves undesirable, it is possible to undo the mistake relatively easily. However, if an amendment proves to be a mistake, change is much more difficult. Of course, desirable changes gained by interpretation are more vulnerable than those obtained through amendments.

For example, it is quite possible that at the end of the nineteenth century, society, committed to a laissez-faire mentality,[78] might have been willing to enact a constitutional amendment protecting freedom of contract from legislative interference. The Supreme Court accomplished this result without constitutional amendment, by interpreting the liberty of the due process clause to include freedom of contract.[79] Based on this interpretation, during the Lochner era, the Court struck down almost 200 state laws regulating business and protecting employees and consumers.[80] By the 1930s it was clear that these rulings were a mistake: consumer and worker protection laws were essential.[81] If freedom of contract and equality of bargaining power ever really existed between employer and employee, it clearly was an illusion during the depression when there were millions of people out of work.

In short, by the 1930s it was clear that the Lochner era doctrines were a mistake and needed to be overruled to facilitate economic recovery and social welfare. If liberty of contract were enshrined in the Constitution, change would have required an amendment that business and conservatives might have tried to block. Because the doctrines were a product of interpretation, the change could be accomplished with relative ease in a couple of Supreme Court decisions.[82]

Originalists frequently point to Lochnerism as a classic illustration of the dangers of nonoriginalism. However, would not the error and the damage have been much worse had the principles of Lochnerism been placed in a constitutional amendment?

Furthermore, interpretation allows incremental change, achieving evolution in situations where dramatic changes would not occur. For example, the desegregation of the South was ordered incrementally in a series of decisions. Initially, the Court, in *Missouri ex rel. Gaines v. Canada*, ordered a southern state to provide law school education within its borders to blacks because it provided such education for whites.[83] The Court stated that unless Mississippi provided equal facilities

for blacks, they were entitled to admission to the existing segregated school. In a later decision, *Sweatt v. Painter*, the Court held that Texas had to admit blacks to the state law school even though it had recently created a separate law school for blacks.[84] The Court found that the separate facilities were not equal, and therefore blacks had the right to attend the white school. In a subsequent decision, *McLaurin v. Oklahoma State Regents*, the Court held that a state could not require a black admitted to a white school to sit in separate sections of classrooms, library facilities, and cafeterias.[85]

All of these cases preceded *Brown v. Board of Education*, which declared unconstitutional racially segregated elementary and secondary schools.[86] *Brown* was followed by a series of decisions striking down Jim Crow laws requiring segregated beaches, buses, golf courses, and parks.[87] Finally, in 1963 the Court could declare, "[I]t is no longer open to question that a State may not constitutionally require segregation of public facilities."[88] Desegregation occurred incrementally, not through one Supreme Court decision or one amendment.

Political scientists have long believed that incremental change is more likely to occur than radical change.[89] The radical change might not happen at all, or at least not until much later, without the incremental reforms. Each incremental change sways attitudes, making subsequent reforms easier to achieve. It might take years of dissatisfaction and worsening conditions before a radical change occurs. Therefore, with incremental changes, society gains the benefit of each of the changes along the way, rather than gaining no benefit until the radical change. Constitutional evolution by interpretation facilitates incremental changes.

Certainly, incremental change has its disadvantages as well. Radical change often can accomplish things that might never come about incrementally.[90] Also, incremental changes can chip away at rights as much as add to them. Nonetheless, over the long term, progressive changes are much more likely to happen incrementally than all at once. Relatively few radical changes occur in a society. Establishments, vested interests, and inertia all make incremental change the only realistic hope for improvements.

Effective Functioning of Government

A final argument for evolution by interpretation is that it is desirable in order for government to function under a constitution. The Constitution, written as a general document, as a blueprint for government,[91] has many gaps. Many of these have been mentioned previously: no one is given authority to recognize foreign governments; no one is given power to remove Cabinet officials; no one is given the power to rescind treaties; and so on.[92] Originalists, focusing almost exclusively on Court decisions protecting rights, ignore the question of how government is to deal with these gaps.

Given the Constitution's commitment to a limited federal government, an originalist likely would have to say that government only has the authority explicitly provided in the Constitution. Additional authority can be granted to the

federal government only by amendment. Therefore, for example, the president cannot remove Cabinet officials because Article II only bestows the appointment power, not removal authority. Likewise, because the removal power is not mentioned in Article I or Article III, neither the legislature nor judiciary possesses such authority. In other words, since the power is not contained in the Constitution, to an originalist it does not exist. No institution or individual would have the authority to remove Cabinet officials.

The degree of inflexibility embodied in an originalist approach could virtually paralyze government. Government needs to do countless things that the Framers could not possibly have imagined. Powell observes that even in the first few years of the country numerous decisions had to be made where the Constitution provided little guidance:

> The establishment of the executive departments, the debates over a protective tariff and a national bank, the consideration of a memorial against the slave trade and of the proper means of handling public debt—all involved the resolution of constitutional authority not plainly answered on the face of the document.[93]

An originalist must concede that without express constitutional authorization government lacks the authority to act until the Constitution is amended. Interpretation, on the other hand, allows the gaps to be filled and permits government to function under a general, constitutive document.

The conclusion that emerges from these arguments is that the Constitution should evolve by interpretation, not just by amendment. Institutions engaged in constitutional decision making are not bound to follow the Framers' intent or the originalist paradigm. The Constitution's purposes are best fulfilled if the Constitution is not limited to the norms stated in the text or intended by its drafters. The interpretation of the Constitution should be an evolutionary process, providing modern meanings for constitutional provisions.

The logical next questions are: Who should have authority to interpret the Constitution? and What constraints should exist on institutions engaged in constitutional interpretation? These questions are addressed in the next two chapters. Before examining these issues, however, it is necessary to consider attempts by some originalists to redefine the paradigm to answer the arguments advanced for nonoriginalism.

ALTERNATIVE MODELS OF ORIGINALISM

In considering originalism, I have focused on the traditional definition, offered by commentators such as Raoul Berger, that the Constitution's meaning is limited to that which is expressed in the text or intended by the Framers. Some, who consider themselves originalists, have developed alternative definitions of originalism that are less rigid and that allow some evolution by interpretation. I contend that either these models are so indeterminate as to be indistinguishable

from nonoriginalism or they suffer from all the problems described above of a model that allows the Constitution to evolve only by amendment.

At this point, it is worth trying to clarify the notion of *indeterminacy*. In the simplest sense, indeterminacy exists if there is no single correct answer to a legal question. If judges acting in good faith can come to opposite, equally defensible conclusions, the matter can be labeled indeterminate. To a large extent, originalists defend their methodology by pointing to the indeterminacy and judicial discretion that exists under nonoriginalism.

There is, of course, a continuum of indeterminacy—ranging from judges having relatively few acceptable choices to a much larger set of possible outcomes. The point I make in this section about moderate originalism is that it does not yield determinacy and in fact creates a very large set of acceptable outcomes.

Phrased differently, the conclusion I seek to establish here is that moderate originalists are nonoriginalists if they allow evolution by interpretation and originalists if they do not. This does not imply that all nonoriginalists are the same. As discussed in Chapter 6, there are many different nonoriginalist theories according a range of discretion to constitutional interpretation. Here I simply establish that moderate originalists should be considered nonoriginalists, despite their label, to the extent they allow constitutional evolution by interpretation.

Actually, there are several paradigms that try to position themselves between originalism and nonoriginalism. First, there are paradigms that are termed *moderate originalism*.[94] Paul Brest, who coined the phrase "moderate originalism," states that it is "more concerned with the adopters' general purpose than with their intention in a very precise sense."[95] Whereas strict originalism limits constitutional decision making to what the Framers intended, moderate originalism allows consideration of modern circumstances in interpretation. Because the Framers' intent can be stated at many different levels of abstraction, the distinction between originalism and moderate originalism is not always clear. Ultimately, the difference is that originalism is based on the belief that the specific meaning of a constitutional provision is static until it is amended, whereas moderate originalism endorses the view that the meaning of the Constitution shifts over time.

Two prominent examples of moderate originalism deserve consideration. One, which might be termed *conceptualism*, is developed by Ronald Dworkin. Conceptualism requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles.[96] Unlike strict originalism, conceptualism does not require that the Court follow the Framers' specific intentions. Instead, the justices are asked to identify the underlying "concept" of a provision and to use it in formulating modern "conceptions" to guide decision making. Each constitutional provision has a core meaning that is static, which the courts apply to modern circumstances. Dworkin explains:

> Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my meaning is limited to these examples. . . . First I would expect my children to apply my

instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act that I thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of the latter. . . . I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness that I had in mind.[97]

Conceptualism is a form of moderate originalism because the Framers' intent is still relevant—their intent provides the concepts; but conceptualism is distinct from strict originalism because the Court can develop its own modern conceptions in deciding cases. Munzer and Nickel observe that the "object of the distinction between [concepts and conceptions] is to justify the claim that the core meaning of the Constitution remains unchanged even when judges diverge from the specific content that the framers would have found there."[98]

First, advocates of conceptualism must provide a normative argument as to why it is the appropriate method of constitutional interpretation. There is nothing that inherently makes it more desirable or more correct than any other approach. The question not answered by Dworkin and other supporters of conceptualism is, What justifies this method of interpretation?[99] Why, for example, should the Framers' concepts—even if they could be identified—govern modern society? Just as originalists must justify why the Framers' intent should guide interpretation, so must conceptualists justify their use of *original intent* and the desirability of their theory for constitutional decision making.

Second, and more important, conceptualism is so completely indeterminate as to be indistinguishable from nonoriginalism. Conceptualism, by definition, allows evolution by interpretation. Judges are not limited because the concept, the Framers' intent, can be stated at a level of abstraction sufficiently general to permit any result. The concept behind any constitutional provision can be stated at several different levels of generality. For example, the equal protection clause may represent the concept that blacks are entitled to treatment equal to whites.[100] It also could reflect the concept that groups that had been enslaved, as blacks were, should receive equal treatment.[101] The clause might mean that discrimination is impermissible against all racial minorities,[102] or that groups that are "insular" political minorities should be constitutionally protected.[103] Most generally, the clause may embody the concept that all discrimination must be justified by some legitimate government purpose.[104] Each is a plausible interpretation of the underlying concept or purpose behind the equal protection clause, and at various times, each has been endorsed by the Supreme Court.

The result in particular cases will likely depend on the level of generality at which the concept is articulated[105] If the equal protection clause is intended only to protect blacks or former slaves, then the Fourteenth Amendment offers no basis for protection of women. Alternatively, if the concept of equality is stated more generally, the Court is obligated to scrutinize gender discrimination carefully. Conceptualism "demands an arbitrary choice among levels of abstraction."[106] This choice allows judges to find in any constitutional provision concepts so

general that they permit any result.[107] Conceptualism, therefore, is completely indistinguishable from nonoriginalism except that under conceptualism judges must phrase their decision in terms of concepts and conceptions. Conceptualism permits the Court to use values neither stated nor intended in constitutional decision making.

This analysis is not a criticism of conceptualism as a method of interpretation. Rather, it is simply to say that conceptualism cannot claim to be an originalist theory because it provides for constitutional evolution by interpretation.

Even strict originalists at times attempt to use conceptualism to escape the problems of originalism. For example, one of the main difficulties originalists face is that *Brown v. Board of Education*—almost universally regarded as a desirable decision—cannot be justified under an originalist paradigm because the Framers of the equal protection clause did not intend to prevent segregated schooling.[108] Judge Robert Bork, usually a strict originalist, tries to get around this problem by invoking conceptualism. He defends *Brown* on the grounds that the "fourteenth amendment was intended to enforce a core idea of black equality against government discrimination."[109] But why for an originalist such as Judge Bork should the Framers' "core idea" be followed and not their specific intention?[110] And if only the core idea is authoritative, why cannot it be said that the core idea was the elimination of invidious government discrimination, an idea that permits what Bork deems illegitimate: judicial action protecting numerous groups such as women, aliens, and illegitimates? In fact, during the 1950s the Court's decision in *Brown* was attacked by originalists with all the vigor and force now directed to cases such as *Roe v. Wade*.[111]

In other words, originalists cannot rescue their paradigm by embracing conceptualism because by doing so they adopt a model that permits judges to come to results identical to nonoriginalism. Either originalism is wedded to a static Constitution—in which case, it is unacceptable—or it permits evolution by interpretation—in which case, in practice it is a form of nonoriginalism.

An alternative version of moderate originalism is for the interpreter to decide what the Framers would have done had they been confronted with modern circumstances. Lusky phrases this inquiry in its classical form: "What results would the drafters have intended had they been confronted with the problems and context of today's world?"[112] Tushnet labels this approach "transposition."[113]

Transposition is different from strict originalism because it does not limit the meaning of the Constitution to the specific intent of the Framers at the time of the document's drafting. Perry explains:

> The originalist project is not to speculate about what the ratifiers' current beliefs would have been had they survived to this day and then decide the case on the basis of those beliefs. Rather, the originalist project is to enforce those beliefs that were accorded authoritative status by the ratifiers, and therefore to sometimes refer to further beliefs of the sorts indicated.[114]

Transposition is different from conceptualism because it does not hold any part of the Constitution to be static; the entire Constitution is subject to change if the interpreter believes that the Framers would have made such a modification had they been alive to decide the modern case.

Transposition, like conceptualism, is completely indeterminate; there is no way to know what the Framers would have believed had they confronted modern problems.[115] A Court can come to any conclusion, imposing any values, and simply argue that because the result is just, that is what the Framers would have done. All nonoriginalist results can be justified. In fact, if the Framers are thought of as individuals believing in the same abstract values that we do, and if the Framers knew everything we know, then the transposed Framers are indistinguishable from the modern Court.[116] The Court can assume that everything it wants to do is exactly what the Framers would do if they were alive to see how society had changed. In other words, transposition allows the Court to phrase its opinions in terms of why the Framers would agree to the result.

Thus, both conceptualism and transposition, the primary forms of moderate originalism, are not forms of originalism but, rather, are completely open-ended and indistinguishable from nonoriginalism. Both allow the Constitution to evolve by interpretation.

A second major attempt to rescue originalism must be considered also. Some commentators, most notably Michael Perry and Stephen Carter, attempt to overcome the criticisms of originalism by limiting its applicability to certain parts of the Constitution.[117] Both Perry and Carter argue that originalism should be used only for the "political Constitution"—the parts of the Constitution dealing with the structure of government, separation of powers, and federalism.

Neither scholar justifies why the political Constitution should evolve only by amendment. For example, Carter presents three arguments as to why originalism is appropriate for the political Constitution. First, he says that "there may be no good reason not to try to discover the original understanding with respect to the provisions of our political Constitution."[118] This obviously is not an adequate defense of originalism. There must be some substantive theory, some normative explanation for why it is appropriate to interpret any part of the Constitution according to the Framers' intent.[119]

Similarly, Perry focuses his analysis on whether there is a justification for departing from originalism in the areas of separation of powers and federalism. But, as demonstrated at the beginning of this chapter, originalism should not be presumed to be appropriate until another contender is proved superior. In fact, given a long history of nonoriginalist interpretation, it is originalists who should bear the burden of proving the desirability of a change in interpretive methodology.

Second, Carter argues for originalism in applying the political Constitution because "with respect to these structural clauses, neither the moral problem of repugnant result nor the hermeneutical problem of unknowable history should prove insurmountable."[120] Even if this statement is correct, it still does not justify

originalism. Even if the results are acceptable and determinate, that does not explain why this method of interpretation should be used, as opposed to others that also produce acceptable results and are workable.

Furthermore, Carter is wrong—originalism faces the identical problems when applied to the political Constitution as it does when applied in fundamental rights cases. As to the normative problems, Carter says that originalism is inappropriate in fundamental rights cases because it would lead to results that are regarded as "repugnant."[121] If repugnant results justify the rejection of originalism, then it also must be discarded for the political Constitution. Consider a simple example involving Article II, discussed earlier in this chapter. Because Article II refers to the president as "he," and the Framers intended to exclude women from politics, an originalist is compelled to declare unconstitutional the election of a woman as president or vice president.[122] This seems a paradigm example of what Carter terms the "moral problem of the repugnant result."

Nor is Carter correct when he asserts that the political Constitution poses no interpretive problems. In countless areas concerning the structure of government, the Constitution is silent or ambiguous. For example, when may the president exercise inherent authority, acting without express constitutional or statutory authority?[123] This question is critical in answering numerous questions, including whether the president can seize industries,[124] rescind treaties,[125] impound funds,[126] assert executive privilege,[127] or even wage war.[128] Similarly, with regard to the legislative power, the Constitution does not describe when Congress can delegate power or whether the exercise of delegated power can be subject to the legislative veto.[129]

Third, Carter argues that originalism is desirable because it is a "value-free" form of interpretation.[130] Carter writes:

> If judicial decisions aim self-consciously at keeping the structure of government close to the framers' conception, then with respect to the political Constitution, at least, the courts will be able to claim a relatively value-free rule of interpretation.[131]

According to Carter, originalism is desirable because it allows "adjudication under the political Constitution [to] be guided by rules of construction that will permit—or require—interpretations that are relatively value-free."[132]

But originalism is hardly value free. At the very least, the theory embodies a choice to follow the Framers' values—values that were racist and sexist. The Framers meant to exclude blacks and women from government office. Either we follow these values or we must reject originalism. No matter what, a value choice is made.

Moreover, as discussed in Chapter 3, the interpretive process is never value free. Frequently there will be conflicts about what the Framers intended because often the language of the Constitution and the records of the debates are ambiguous.[133] At the least, because conflicting positions were expressed at the Constitutional Convention and in the ratification debates, there is a major interpretive

problem in deciding whose intent matters. Litigation develops precisely because there are conflicts over interpretation. Historians long have demonstrated that there is no such thing as value-free historical interpretation—a person's perceptions and conclusions are always affected by his or her beliefs.[134]

Furthermore, the process of applying the Framers' intent to modern circumstances requires inferences that can never be value free. Legal realists long ago demonstrated that formalism is impossible in deciding cases and the inevitable discretion ensures that values enter into the interpretive process.

In sum, Carter does not justify why originalism should be followed in deciding matters under the political Constitution. More fundamentally, it is specious to distinguish between the political Constitution and fundamental rights cases. The structure of government—separation of powers and federalism—is intended to best ensure protection of individual liberties. As explained in Chapter 2, the structure of government is delineated in the Constitution to prevent those in power from creating a dictatorship or changing the allocation of power to their advantage. There is no conceptual basis for distinguishing the political Constitution from the rest.

Furthermore, all the arguments presented in this chapter as to why the Constitution should evolve by interpretation apply with equal force to the political Constitution. In fact, in developing the arguments for a Constitution that evolves by interpretation, I intentionally provided examples dealing with the structure of government as well as fundamental rights and protecting minorities.

Originalism cannot be rescued. Any theory that allows evolution only by amendment is unacceptable. Any theory that allows the Court to decide cases based on modern values, permitting the Constitution to evolve by interpretation, is nonoriginalism.

5 Who Should Be the Authoritative Interpreter of the Constitution?

Once it is decided that the meaning of the Constitution should evolve by interpretation, the next question is, Who should interpret the Constitution? As indicated earlier, the correct answer is that all government officials and institutions are required to engage in constitutional interpretation. All elected officeholders take an oath to uphold the Constitution. Therefore, legislators—federal, state, and local—are obliged to consider the constitutionality of bills before ratifying them. The executive must consider constitutionality in deciding what laws to propose, which bills passed by the legislature to veto, and what executive policies to implement. The judiciary, at the very least, must consider the constitutionality of laws before applying them to decide cases and controversies. In short, the decision that society shall be governed by a Constitution necessitates that all branches and levels of government interpret the Constitution.

So the real question to be addressed is not who should interpret the Constitution but, more specifically, who should be the authoritative interpreter of the Constitution? When there is a disagreement over how the Constitution should be interpreted, who resolves the conflict? Who gets the final say in determining the meaning of a constitutional provision? (Final, that is, until the interpretation is overruled in a constitutional amendment or the interpreter changes its mind.) Disagreements over the meaning of the Constitution are inevitable. For example, Congress enacts a statute that it, implicitly or explicitly, declares to be constitutional. The judiciary, in considering the law, concludes that it is unconstitutional. Whose view triumphs? The president claims a right to keep certain documents secret because of executive privilege. The Court rules that executive privilege does not apply. Whose view triumphs? The president rescinds a treaty and asserts inherent constitutional authority to do so. The Senate believes that