such recision without its advice and consent is unconstitutional. Whose view triumphs?

WHO IS THE AUTHORITATIVE INTERPRETER?

There are three possible answers to the question of who should be the authoritative interpreter of the Constitution. One approach is for no branch of government to be regarded as authoritative in constitutional interpretation. Each branch of government would have equal authority to determine the meaning of constitutional provisions, and conflicts would be resolved through political power and compromise. If Congress and the president believe that a law is constitutional, and they could implement it without assistance from the Court, they could disregard a judicial ruling of unconstitutionality. If the president believes a law to be unconstitutional, he or she could refuse to enforce it, notwithstanding declarations of its constitutionality from the legislature and judiciary.

This approach to constitutional interpretation finds support early in U.S. history from presidents such as Thomas Jefferson and Andrew Jackson. Jefferson wrote:

> But nothing in the Constitution has given . . . [the judges] a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power is confided to him by the Constitution. That instrument meant that its coordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature and Executive also, would make the judiciary a despotic branch.[1]

Similarly, Andrew Jackson declared in vetoing a bill to recharter the Bank of the United States:

> The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.[2]

Under this first approach, there is no authoritative interpreter of the Constitution.

Support for this first approach is found not only in proclamations of long-dead presidents. Very recently, the Reagan administration articulated and advocated the view that each branch has equal authority to interpret the Constitution, and that the executive and legislature are not bound by the judiciary's rulings. Specifically, the president took this position in connection with his objection to the constitutionality of a provision in the Competition in Contracting Act (CICA).[3] Congress enacted the CICA in 1984 and in it gave the comptroller general the authority to freeze the awarding of government contracts under some circumstances.[4] The comptroller general is the highest ranking official in the General Accounting Office, a congressional agency.[5] The president signed the CICA but objected to the constitutionality of the provision giving the comptroller general the power to stay the award of public contracts.[6] The president, through an order issued by Budget Director David Stockman, commanded all executive agencies to disregard the unconstitutional provision of the statute.[7] The Justice Department explained the executive's position: "The President's duty to faithfully execute the law requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land."[8]

On March 27, 1985, the United States District Court for the District of New Jersey upheld the constitutionality of the challenged provision of the law.[9] The Reagan administration, however, proclaimed that it was not obligated to follow the court's decision. Attorney General Edwin Meese declared that the executive, like the judiciary, has the duty to independently interpret the Constitution.

> Courts decide disputes between parties, not abstract questions of law. The President takes an oath to 'preserve, protect, and defend' the Constitution. This oath implies a duty to resist encroachments by the legislature upon his constitutional authority. Believing that the disputed provisions of the Competition in Contracting Act to be unconstitutional, the President has a duty not to execute them, especially because any other course would in all probability preclude obtaining a final judicial determination on the matter.[10]

Confronted with the executive's open defiance of a statute and a court decision upholding the law, the House Government Operations Committee voted a recommendation that "funds be withheld from the offices of the Attorney General and the director of the Office of Management and Budget until the Administration reverses its position."[11] The Reagan administration then announced that it would comply with the act, which subsequently was upheld as constitutional in a decision by the United States Court of Appeals for the Third Circuit.[12] The example is important because it reflects that even to this day there is support for the view that there is no authoritative interpreter of the Constitution and that each branch has equal right to decide constitutional questions.

In fact, in October 1986 Attorney General Edwin Meese gave a highly publicized speech in which he explicitly attacked the view that the judiciary is the ultimate arbiter of constitutional questions. Meese argued that each branch has

equal authority to decide for itself the meaning of constitutional provisions. Meese remarked: "The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislature no less than the judiciary—has a duty to interpret the Constitution in the performance of its official functions. In fact, every official takes an oath precisely to that effect."[13]

There is a second, distinct approach to the question of who is the authoritative interpreter of the Constitution: that for each part of the Constitution one branch of government is assigned the role of final arbiter of disputes, but it is not the same branch for all parts of the Constitution. Thus, each branch would be the authoritative interpreter for some constitutional provisions. Because the Constitution does not specify who should interpret the document, some institution would need to allocate interpretive authority among the branches of government.

Arguably, the second approach is the one that best describes the current system of constitutional interpretation. The judiciary has declared that cases arising under certain parts of the Constitution pose political questions and are matters to be decided by branches of government other than the courts. For example, the courts frequently have held that challenges to the president's conduct of foreign policy—such as whether the Vietnam War[14] or the current activities in Nicaragua[15] are unconstitutional—pose a political question not to be resolved by the judiciary. By declaring a matter to be a political question, the Court states that it is for the other branches of government to interpret the constitutional provisions in question and decide whether the Constitution is violated. The effect is the second approach: for each part of the Constitution, there is a final arbiter, but it is not the same branch for all constitutional provisions.

A third and final approach is to assign to one branch of government final authority for all constitutional interpretation. Although every governmental institution interprets the Constitution, one branch is assigned the role of umpire; its views resolve disputes and are final until reversed by constitutional amendment. Arguably, *Marbury v. Madison* endorses this approach. Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[16] Similarly, in *United States v. Nixon*,[17] the Supreme Court held that it was the judiciary's duty to determine the meaning of the Constitution. In rejecting the president's claim that it was for the executive to determine the scope of executive privilege, Chief Justice Warren Burger, writing for the Court, stated:

> The President's counsel [reads] the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of [*Marbury* v. *Madison*] that 'it is emphatically the province and duty of the judicial department to say what the law is.'[18]

Marbury v. Madison and *United States v. Nixon*, however, could be viewed as ambiguous and as not resolving the question of which of these three approaches is preferable. *Marbury* could be read narrowly as holding only that the Court is the

final arbiter of the meaning of Article III of the Constitution, which defines the judicial power. The specific issue in *Marbury* was whether a section of the Judiciary Act of 1789 was inconsistent with Article III. Accordingly, *Marbury* could be interpreted, consistent with the second approach described above, as assigning to the judiciary only the responsibility for interpreting Article III. In fact, *Marbury* could even be seen as consistent with the first approach, that there is no final interpreter of the Constitution. By this view, *Marbury* simply holds that the judiciary may interpret the Constitution in deciding cases—it is one voice—and that it is not required to defer to legislative or executive interpretations. *Marbury*, according to this argument, says nothing about whether other branches of government are bound to follow the Court's interpretation. Chief Justice Marshall's declaration could be understood as emphatically declaring that the Courts do get a say. Under this approach, *Marbury v. Madison* says nothing about who is the authoritative interpreter of the Constitution.

Likewise, *United States v. Nixon* could be viewed as a limited ruling that the judiciary has the final say in cases raising the question of access to evidence necessary for criminal trials. The Court in *Nixon* emphasized the judiciary's special role in ensuring fair trials.

> The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the functions of the courts under Article III. . . . [T]o read the Article II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of non-military and non-diplomatic discussions would upset the constitutional balance of a 'workable government' and gravely impair the role of the courts under Article III.[19] The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. [I]t is the manifest duty of the courts to vindicate [the Sixth and Fifth Amendment] guarantees and to accomplish that it is essential that all relevant and admissible evidence be produced.[20]

Thus, *United States v. Nixon* can be viewed as a narrow holding that the Court is the final arbiter in matters relating to the judiciary's powers under Article III.

Therefore, in determining who is the authoritative interpreter of the Constitution, it is necessary to choose among three approaches—that there is no final arbiter over cases presenting questions as to the Constitution's meaning; that each branch is the final arbiter for some constitutional provisions; and that one branch should be the final arbiter in all disputes over constitutional interpretation—each of which has some support. The next section of this chapter considers why the judiciary is better suited to engage in constitutional interpretation than Congress or the president. The final section of the chapter discusses why the judiciary should be the authoritative interpreter of all constitutional provisions—that is, why the third approach described above is preferable.

JUDICIAL INTERPRETATION

The federal courts, and especially the Supreme Court, are best suited to engage in constitutional interpretation for two separate, although interrelated, reasons. First, it is the institution most able to protect the Constitution's structure and values from majoritarian pressures. Second, the judiciary's decision-making method is preferable for constitutional interpretation and evolution.

Judiciary Protection from Majoritarian Pressures

Earlier, I argued that the Constitution exists to protect certain matters from majoritarian decision making. A society chooses to have a constitution, rather than just to be governed by statutes, in order to safeguard the structure of government and fundamental values from majority rule. In large part the decision to be governed by a constitution is animated by fear that a political majority could gain control of government and disenfranchise, and perhaps persecute, the minority. A constitution is unique primarily because of the difficulty of amending or altering it.

Accordingly, in deciding who should be the authoritative interpreter of the Constitution, a primary criterion should be determining which branch of government can best enforce the Constitution against the desires of political majorities. Under this criterion, the federal judiciary is the obvious choice. The judiciary is the institution most insulated from political pressures. Article III of the Constitution provides that federal court judges have life tenure, unless impeached, and that their salary may not be decreased during their terms of office. Unlike legislators or the president, federal judges never face reelection.

Furthermore, the method of federal judicial selection reinforces its antimajoritarian character. Unlike the House of Representatives, whose members are elected at the same time, or the Senate where one third of the members are chosen at each election, the Court's members are appointed one at a time, as vacancies arise. Therefore, generally, no single administration is able to appoint a majority of the Court or of the federal judiciary. The result is that the Court reflects many political views, not just that which is dominant at a particular time.

Certainly, it is not original or profound to observe that the judiciary's political insulation makes it well suited to uphold the Constitution. If anything is clear from the structure of the Constitution and the language of Article III, it is that the federal judiciary was given life tenure and salary protection precisely to ensure its independence. It, however, is worth elaborating why this insulation is so important in the process of constitutional evolution and interpretation.

First, the judiciary is the only institution obligated to hear the complaints of a single person. For the most part, the federal judiciary's jurisdiction is mandatory. Although the Supreme Court has discretion in choosing which cases to hear, with rare exceptions, a lower federal court must rule on every case properly filed with it.[21] Long ago, Chief Justice Marshall wrote, "[I]t is most true that this Court will

not take jurisdiction if it should not but it is equally true that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[22]

In contrast, the legislature and the executive are under no duty to hear the complaints of a single person. An individual or small group complaining of an injustice to a legislator or the president could be ignored easily. If only a few constituents care about something, and if acting to help them would consume more time than it seems worth to get their votes in the future, they may be ignored. Moreover, if helping the few will hurt more constituents, the few are likely to be disregarded, no matter how just their cause. For example, prisoners are a constituency with relatively little political power. In many states, felons are permanently disenfranchised from voting, meaning that elected officials need worry little about meeting their demands.[23] Providing adequate resources for prisoners—sufficient money for their shelter, food, medical care, and training—requires expenditures of money unlikely to be popular with taxpayers. With no constituency to pressure for their humane treatment, the political process tends to ignore the rights and needs of prisoners.[24]

The courts, however, are obligated to rule on each person's properly filed complaint. It does not matter whether the litigant is rich or poor, powerful or powerless, incarcerated or not. The Constitution's purpose of protecting the minority from the tyranny of the majority is best fulfilled by an institution obligated to listen to the minority. Groups such as prisoners and mental patients are most likely to have their rights protected through an institution such as the judiciary that is required to address their complaints.[25] Similarly, the judiciary is much more likely than the legislature to listen to criminal defendants' claims that their rights were violated, or to poor individuals' objections that they are denied equal justice.

Second, the judiciary not only is most likely to listen to complaints, but it is also most likely to respond to them and apply the Constitution. The judiciary is supposed to decide each case on its own merits, subject only to the accepted norm that like cases should be treated alike.[26] Therefore, in every case where there is an allegation that the Constitution is being violated, the judiciary is obligated, if it has jurisdiction and if there is no way to decide the case on nonconstitutional grounds, to issue a constitutional ruling.[27] The legislature, by contrast, need not decide each matter before it on its own merits. Logrolling and voting trade-offs are accepted parts of the legislative process.[28] Although legislators are forbidden by their oath of office to enact laws that they believe to be unconstitutional, they are not required to provide a remedy every time someone complains that government is doing something unconstitutional. Only the judiciary is obligated to respond to unconstitutional practices—something that makes the courts an ideal forum for ensuring that the Constitution is upheld.

Third, the judiciary is most willing to enforce the Constitution when faced with strong pressures from political majorities. Even if the legislature and executive would listen to all claims and respond on the merits, they are still less likely to

uphold the Constitution when faced with intense reactions from their constituents. The judiciary's insulation from politics makes it best suited to enforce the Constitution. It is this insulation that caused Alexis de Tocqueville to remark that "the power vested in the American courts of justice of pronouncing a statute unconstitutional forms one of the most powerful barriers that have been devised against the tyranny of political assemblies."[29]

The argument is not that legislators are likely to act in bad faith and disregard their oath to uphold the Constitution (although there may be cases where this does occur). Rather, the point is that constitutional interpretation inherently requires choices as to what the Constitution should mean. Constitutional interpretation requires decisions as to how the abstract values stated in the Constitution are best applied in specific situations. These choices are best made by an institution whose primary commitment is to the Constitution, not to gaining reelection. Owen Fiss observes that "[l]egislatures are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, current preferences of the people."[30] The judiciary, much more than the political branches of government, is to be trusted in deciding whether the Constitution should protect the speech activities of a politically unpopular group, such as the Nazi party. The judiciary, committed to upholding the First Amendment, and not faced with intense pressure from constituents, is in a better position to decide whether school prayer violates the Constitution. The judiciary, relatively insulated from intense lobbying, is better suited to deciding whether the right of privacy includes the right of a woman to decide whether to have an abortion.

The best institution for interpreting the Constitution is thus not the one that most reflects the current preferences of the majority. Rather, constitutional interpretation is best done by a politically insulated body. Harry Wellington explains:

> If society were to design an institution which had the job of finding society's set of moral principles and determining how they bear on concrete situations, that institution would be sharply different from one charged with proposing policies. The latter institution would be constructed with the understanding that it was to respond to the people's exercise of political power. . . . The former would be insulated from pressure. It would provide an environment conducive to rumination, reflection and analysis.[31]

Constitutional interpretation is a process of deciding what values are so fundamental that they should be safeguarded from political majorities. It makes little sense to allow the majoritarian process to decide what should be protected from itself. No matter what the appropriate process of identifying constitutional values—finding the natural law,[32] articulating the "deep consensus,"[33] applying traditions[34]—the judiciary's insulation and commitment to decisions based on the merits make it best suited for such interpretation. Alexander Bickel remarked that "courts have certain capacities for dealing with matters of principle that legislatures and the executive do not possess. Judges have, or should have, the leisure,

the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society."[35] Constitutional interpretation requires an institution to serve as the nation's moral conscience; an institution responsible for identifying values so important that they should not be sacrificed and reminding the country when it is violating its own most cherished values. The Supreme Court frequently has defined its role in exactly these terms, as a moral conscience.[36]

Finally, the legislature is to be trusted least when the question is the constitutionality of a statute that it enacted. Constitutional values will not be protected from majority rule if the legislature can both enact laws and determine their constitutionality. Allowing review by another branch of government creates a check that otherwise would not exist. The executive veto provides something of a check; however, Congress can override a veto. Moreover, the president is electorally accountable and may reflect the same pressures as Congress. Thus, the judiciary is most detached and has the least involvement in the enactment of laws or the implementation of policies. The Court's only self-interest is in enhancing its long-term powers. Certainly, the judiciary's institutional self-interest justifies fear of its deciding cases to aggrandize its own powers. I would argue, however, that in resolving specific controversies it is better to trust an institution with only long-term interests than one with immediate interests in the outcome of the matter.

In sum, once it is decided that society should be governed by a constitution in order to make certain matters less amenable to majoritarian control, judicial review is a desirable mechanism for interpreting and enforcing the document.

The Judiciary's Decision-Making Methods

In addition to the conclusion that the courts are most able to protect the Constitution from majoritarian pressures, the methods of judicial decision making make it the best institution for constitutional interpretation. The judiciary is unique in that it is the only institution committed to arriving at decisions based entirely on arguments and reasoning.[37] Executive and legislative officials frequently offer no formal explanations for their decisions, and even when they provide statements, they usually do not purport to be comprehensive. The judicial method is a process of hearing arguments (written and oral) from the parties, reaching decisions based on the arguments, and justifying the results with a written opinion stating reasons for the decision. Although neither the Constitution nor any statute compels a court to write and publish opinions, publicly stated reasons for decision are embedded in the U.S. legal system.[38] In fact, it has long been recognized that the "traditional means of protecting the public from judicial fiat . . . [are] that judges give reasons for their results."[39]

The Court must write an opinion demonstrating that its decision is not arbitrary. The Court must explain both why the values it is protecting are worthy of constitutional status and how those values are embodied in legal principles.[40] Additionally, the Court must explain why its decision is consistent with prior

holdings, is legitimately distinguishable from precedents, or justifies overruling conflicting cases.[41]

In contrast, the legislature and the executive need not follow any particular decision-making process. Neither Congress nor the president is required, either by law or by tradition, to state reasons for its decisions. Although Congress produces legislative histories and the president issues executive proclamations, only the judiciary is committed to reaching all decisions by logical reasoning from principles, rather than results based on political considerations. A legislature is allowed, even expected, to make arbitrary choices unsupported by a guiding principle. Even if all the Supreme Court's constitutional decisions are merely hunches or reflections of personal predilections,[42] the Court must still justify those conclusions in legally acceptable terms.[43] Moreover, only the judiciary is committed to following precedent in reaching its decisions.

For several reasons, constitutional interpretation is best done by an institution, such as the judiciary, committed to deciding issues based on arguments and reason. First, the judiciary's method helps ensure that the Constitution will serve as a constitutive document uniting the country. In announcing its decisions, the Court describes how it is applying the values of the Constitution. In deciding a case under the First Amendment, the judiciary explains why its result is consistent with society's commitment to freedom of speech. In ruling on a matter of presidential power, the Court explains why its holding preserves the principle of separation of powers. In other words, the judiciary is reinforcing the Constitution's underlying norms. The Court's opinion reminds the country of its most precious values; it ensures that the values are not forgotten in the press of making specific decisions.

Furthermore, the judicial opinion links the result in a particular case to the Constitution. In this way, it is shown that it is the Constitution that is governing. The Constitution remains at the center of society and performs its constitutive function. If results were reached without explanation of their relationship to the Constitution, it would be easier to assume that the Constitution was being ignored, and over time, the Constitution would seem progressively less important for society.

The application of general values to specific cases helps people to understand the central, abstract values, encouraging the internalization of these values and reinforcing that which unites a diverse country. Girardeau Spann writes that "[w]hen courts expound constitutional provisions, they restate society's fundamental values in concrete understandable terms, enabling individuals and institutions to incorporate these values into their conduct."[44]

In short, there is less reason for the people to believe that the legislature or the executive reached its decision based on consideration of the Constitution, rather than on political interests and expediencies. In viewing legislative and executive decisions, which generally are not justified with a written opinion, there is no way for the people to understand that constitutional values are governing. By contrast, the judiciary's commitment to decisions on the merits, and its statement of reasons

for its decision, reminds the people that the Constitution—that which unites them—is governing.

Second, the judiciary's method increases the legitimacy of results in particular cases and therefore increases the likelihood that the Constitution will be complied with. The written opinion demonstrates that the result is not arbitrary or just the result of political compromise. The judicial decision shows that the ruling can be justified by analysis and argument.

At the very least, this helps the loser accept the result because he or she is shown that it is not capricious. John Dewey explained that a "rational statement which formulates grounds and exposes connecting or logical links . . . [is] an alternative to arbitrary [decisions] . . . accepted by the parties . . . only because of the authority of the [decision maker]".[45] People are more likely to respect a decision based on reasons than one that appears to be a purely arbitrary choice.

Furthermore, the very fact that the decision is explicitly linked to the Constitution increases the likelihood that it will be respected and complied with. Decisions that might otherwise be opposed, and thus threaten the stability of the government, gain support from the realization that the result is based on constitutional interpretation. People who disagree with the result, but support the Constitution and judicial review, face a situation labeled by social psychologists as *cognitive dissonance*.[46] There is a tension between their negative beliefs about the outcome of a case and their positive attitudes about the institution and its basis for decision. Some people might resolve this dissonance by changing their mind and accepting the Court's decision. At the least, their support for the government's structures and processes might lessen their opposition to the particular result.

Additionally, the judiciary's independence increases respect for its decisions. The strict standards of judicial ethics, ensuring that judges do not participate if they have any personal interest, encourage people to believe that the result does not reflect the self-interest of the decision maker. The political insulation of the judiciary, described above, helps people to accept that their loss was based on a consideration of principle, not on the fact that they were politically too powerless. If the legislature interpreted the Constitution and ruled against them, it would be much easier to attribute their loss to insufficient clout or political influence. Again, the effect of the judicial ruling is to increase the respect for the decision.

By defusing opposition to constitutional decisions, judicial opinions increase the likelihood that the decision will be complied with. In other words, society is more likely to accept and comply with the result that the Constitution is interpreted as requiring; there is a greater likelihood that the Constitution's protections will be implemented. In the long term, this reinforces the appearance that the Constitution is governing and helps the Constitution to remain at the center of society.

For example, if the legislature enacted a law protecting the right of a group to protest, its decision might be regarded as arbitrarily favoring demonstrators over the community, and it might be unclear whether the statute is based on consti-

tutional interpretation. However, a judicial decision will state explicit reasons for the result and explain how the result is based on the First Amendment. This process increases the likelihood that the First Amendment will be complied with and reinforces freedom of speech as a fundamental value for society.

Thus, the very existence of an opinion, linking the result to the Constitution and issued from an independent judiciary, increases compliance with the Constitution. Moreover, the written opinion allows the Court to attempt to persuade those who would otherwise disagree. For example, the Court can appeal to a widely shared value and explain why the result follows from it. In interpreting the Constitution, the Court explains the implications of society's general values for particular cases. In the desegregation cases, for instance, the Court declared that given society's commitment to equality, racial separation was unacceptable. In *Brown v. Board of Education* the Court appealed to the widely shared belief that quality education is essential and argued that it could never be achieved in segregated schools.[47] In the abortion cases, the Court explained why accepted notions of privacy and personal autonomy require allowing women to choose whether to have abortions.[48]

History shows that judicial decisions do have persuasive effect. Popular opinion polls show a substantial increase in public support for desegregation and legalized abortions after the Supreme Court's decisions.[49] The overall result is to increase compliance with the Constitution and reinforce the importance of the Constitution for the society.

Third, the judiciary's method is preferable for constitutional interpretation because it exposes errors and facilitates the correction of mistakes. The competing arguments of the parties help to ensure that all relevant factors are considered by the courts.[50] Furthermore, the process of writing an opinion requires the Court to think through its decision and be able to justify the results. Errors in reasoning can be revealed to a court as it tries to explain its decision. Imagine two types of decision making. In one the decider only declares the result with no explanation. In the other the decider must explain the basis for the result. Virtually everyone would agree that under the latter approach decision makers would be more careful in reaching their results, and their increased thoughtfulness likely would prevent errors.

Furthermore, the process of articulating reasons for a decision facilitates criticism, which helps to correct mistakes. If just the result is announced, there is nothing to criticize except the outcome. Without an explanation for a decision, it is impossible to argue with someone's reasoning or to expose errors in their premises. Judicial opinions that explicitly state their premises and their logic allow commentators and future litigants to argue that errors were made or to point to inconsistencies in the reasoning of various decisions. As a result, mistakes can be identified and corrected. There are numerous cases in which the Supreme Court has reversed itself and overruled precedents.[51] It is likely that in many of these instances the reversals reflected the exposure of errors in the earlier decisions. For example, when the Court reversed its restrictive interpretations of the commerce

clause, it did so by directly attacking the reasoning of the earlier cases and pointing out the errors in the earlier holdings.[52]

Additionally, the statement of reasons in an opinion facilitates constitutional evolution because the justification helps future courts to identify when the earlier decision is out-of-date. In other words, if the reasons are known, it is possible to identify when the reasons are no longer applicable. *Betts v. Brady* was overruled by *Gideon v. Wainwright* when it became clear that the reasoning in the former case, especially its view of federalism, was inconsistent with other decisions and anachronistic.[53] When the reasons are stated, inconsistencies become apparent and can be remedied. In short, the judicial process of written reasoned elaboration is best for interpretation because it aids in the identification and correction of mistakes.

Fourth, the judiciary's written opinions announce constitutional standards, permitting government to know what it must do to act constitutionally. Government officials can shape their actions because they know in advance what is, and is not, permissible. The Constitution's mandates can be enforced much more effectively when its requirements are clearly articulated.

For example, in *Roe v. Wade* the Court instructed the legislature as to what type of regulation of abortions is permissible in each trimester of pregnancy.[54] Some have criticized the Court's opinion in *Roe*, arguing that it was poor opinion drafting for the judiciary to issue a decision that so closely resembled a statute. But the alternative to the Court's approach would have been to declare the statutes before it unconstitutional without spelling out what types of regulations would be deemed permissible. Subsequently, legislatures would try different types of statutes, and through a series of decisions, ultimately the Court's trimester distinctions would emerge. By describing the appropriate standards at the outset, the Court was able to provide clear guidance to legislatures, increasing the likelihood that constitutional laws would be enacted.

Similarly, in *Miranda v. Arizona*[55] the Court told police officers exactly what they needed to do in order to prevent coerced confessions. In *Brandenburg v. Ohio*[56] the Court announced the circumstances under which a person can be punished for advocating illegality. In *Miller v. California*[57] the Court described what materials may be deemed obscene and censored. In *Lemon v. Kurtzman*[58] the Court announced a three-part test for determining whether a government action is an unconstitutional establishment of religion.

The examples are endless. Although the standards in these cases can be criticized, what is important is the very existence of the criteria announced in the decisions. The standards provide notice to government officials as to when and how they may act. The standards give the Constitution concrete meaning. Without written opinions, it would be much harder for officials to decide what they could and could not do. As a result, unconstitutional activity would be much more frequent.

In addition, the requirement that standards be articulated helps the judiciary to identify instances where an approach cannot work precisely because standards

cannot be formulated. Recently, the Court announced that it was overruling its decision in *National League of Cities v. Usery* because it could not formulate a workable test for determining what congressional activities infringe state sovereignty.[59] In *National League of Cities* the Court spoke of the Tenth Amendment's reserving to the states a zone of activities "traditionally" left to the states and "integral" to the states' existence.[60] Nine years later, after numerous decisions construing the meaning of this test, the Court concluded that it could not devise a principle for determining what are traditional or integral state activities.[61] The Court overruled *National League of Cities*, reflecting how written opinions aid in the identification of errors in constitutional reasoning and the improvement in constitutional doctrine.

Fifth, judicial opinions facilitate stare decisis, respect and adherence to precedent in decision making. Michael Moore explains the values of stare decisis:

> Equality, in its guise as formal justice, is served by a court treating like cases alike. Liberty is advanced by the enhanced predictability such consistent interpretation makes possible. To the extent that people do rely on court precedent, substantive fairness is served as well by attaching some weight to past decisions. Finally, efficiency may be furthered by some doctrine of precedent operating; for the doctrine of precedent forecloses some issues from being reargued and redecided, encourages settlements, and generally allows more focused litigation.[62]

At the very least, the judiciary is best suited for constitutional interpretation because it is the only branch of government that follows precedent in reaching decisions. Moreover, written opinions help future courts know when a decision is controlling and when it is distinguishable. By articulating the facts that are central to reaching a decision, it is possible to know which future cases are alike, and should be treated alike, and which are different.[63]

Because of precedents, constitutional interpretation is not just a series of random decisions based on intuitions in particular cases.[64] Instead, constitutional provisions are given meaning that grows increasingly detailed over time. The precedents provide a justification for future decisions, which allow courts to explain their results as nonarbitrary, increasing compliance to, and the legitimacy of, the decisions.

Sixth and finally, the judiciary's method facilitates the moral reasoning that should be a part of constitutional decision making. As explained previously, constitutional interpretation involves deciding what values are sufficiently important that they should be protected from political majorities. Those who believe that there is a moral reality—an objectively true set of moral precepts—would say that the Court should identify those values that are true and protect them from political pressures.[65] Michael Perry, who identifies himself as a moral realist, provides a persuasive argument that the Court can serve as a moral prophet, helping society evolve toward moral truths. Perry writes that the "politically insulated judiciary is more likely when the human rights issue is a deeply con-

troversial one, to move us in the direction of a right answer . . . than is the political process left to its own devices which tend to resolve issues by reflective, mechanical reference to established moral conventions."[66] Perry argues that judicial review has "functioned, on balance, as an instrument of deepening moral insight and of moral growth."[67]

From the perspective of the moral realist, judicial decisions provide a dialogue—with commentators, other branches of government, subsequent litigants, and future courts. This dialogue helps identify errors, for the reasons described above, and therefore helps society toward finding moral truths. Because of its insulation, the Court can serve as a moral leader.

Many who deny the existence of a moral reality believe that values arise from shared premises. Under this view the judicial process provides a way of identifying shared values and reasoning from them. In other words the "Court's task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law."[68]

Some believe that the Supreme Court should determine the values deserving constitutional protection by looking to U.S. traditions,[69] whereas others argue that the Court should identify "deeply embedded cultural values."[70] Regardless of the specific approach, the Court is best suited to identify values worthy of constitutional protection. Because of its insulation from politics, the judiciary is most able to determine what tradition requires and to articulate the content of the deep consensus. The Court can show society the conclusions that follow from its values.

In any event, from both of these perspectives the appropriate moral standards are best identified through a process of rational exploration and decision. The judicial process most ensures rationality because of its requirement for argument and elaboration. Furthermore, "the Court's decisions . . . stimulate better ultimate choices, because of their tendency to require the polity to think again about whether it really does wish to pursue the policies rejected by the Court."[71]

In sum, the judiciary's method make it best suited for constitutional interpretation. Additionally, the courts are preferable to the executive and the legislature for constitutional interpretation because they are the most insulated from political pressures.

WHY THE JUDICIARY SHOULD BE THE FINAL ARBITER

For the most part, government operates without a need for constitutional interpretation. Many provisions of the Constitution are sufficiently clear and specific to provide adequate instructions for the conduct of government. For example, there is usually no dispute as to how federal government officials are elected, the length of their terms of office, or the procedures they are to follow in enacting laws.[72] There are, however, many constitutional provisions that are

ambiguous and lack the degree of specificity found in sections of the Constitution dealing with the selection process. Because of constitutional provisions that are not completely clear, constitutional conflicts do arise—controversies posing questions as to the proper meaning of specific constitutional provisions and questions about how to resolve conflicts among various sections of the document. The question posed at the beginning of this chapter is, How should these conflicts be resolved? Put another way, who should be the authoritative interpreter of the Constitution?

The worst approach is if no branch of government is authoritative, with all constitutional questions resolved by political power and compromise. Under this approach, the executive and legislature would be under no obligation to follow judicial interpretations of the Constitution. Each branch could interpret the Constitution for itself, without regard to the others' views. As such, the legislature and executive could institute a policy of persecuting minorities and simply ignore judicial declarations invalidating their policy. The judiciary's functions as an antimajoritarian check would be lost if the politically accountable branches could disregard virtually all judicial rulings.

Furthermore, the Constitution would not have an articulated meaning. There would be a series of Court decisions, some followed, some not. The ultimate results would simply reflect the respective powers of the various branches and not the Constitution's mandates. The benefits of the judiciary's method of decision making would be lost, as the other branches would be authoritative for many constitutional decisions.

Constitutional crises would be commonplace if no branch of government were the authoritative interpreter of the Constitution. For example, what would happen if the judiciary declared an executive practice unconstitutional and enjoined it, but the executive steadfastly maintained it was constitutional and ignored the injunction? The example is not farfetched—if no branch were regarded as authoritative in constitutional interpretation, what would have happened after *United States v. Nixon* when the judiciary and the president disagreed over the proper scope of executive privilege?[73] One possibility is that Congress could try to impeach the president for ignoring a judicial order. This option is obviously extreme, highly disruptive of government, and unlikely to be used except in rare circumstances. Alternatively, the Court could hold the president in contempt and impose judicial sanctions on the chief executive. It is unclear whether it is constitutional to impose such sanctions on a sitting president.[74] Furthermore, because it is unlikely that the Court will implement its own punishment for contempt (having the Court marshal arrest the president and hold him or her in jail), the judiciary needs to depend either on the executive to act against the president or on impeachment. Any of these options would provoke major constitutional crises.

To develop the meaning of the Constitution in an orderly, coherent manner and ensure that its mandates are observed, society needs an authoritative interpreter of the Constitution. The previous section described why the Supreme Court, and the

federal judiciary, is best suited to serve in this role. Now I want to argue that the Court should be the authoritative interpreter of the meaning of *all* constitutional provisions.

Currently, there are many parts of the Constitution that the Court refuses to interpret. For these provisions, the political branches are the authoritative interpreters. For example, in a series of decisions the Supreme Court has said that certain constitutional challenges only state a "generalized grievance" and therefore no plaintiff has standing to sue. In *United States v. Richardson*,[75] the plaintiff claimed that statutes providing for the secrecy of the Central Intelligence Agency budget violated the Constitution's requirement for a regular statement and account of all government expenditures. The Court refused to rule on whether the challenged statute violated the Constitution. The Court held that the plaintiff's case only presented a "generalized grievance," and hence the plaintiff lacked standing to sue. The Court concluded that because the plaintiff could not show that his personal rights were violated, but instead only could claim injury as a citizen and taxpayer, the Court should not rule. The Court held that ultimately the statements and accounts clause was a part of the Constitution to be enforced not by the judiciary but rather by the political process.

> It can be argued that if respondent is not permitted to litigate this issue, no one can do so. In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process.[76]

Similarly, in *Schlesinger v. Reservists Committee to Stop the War*, the plaintiffs sued to enjoin members of Congress from serving in the military reserves.[77] Article I, section 6, of the Constitution prevents a senator or representative from holding civil offices. Again, the Court refused to rule on the plaintiffs' claim of unconstitutionality, holding that the matter posed a generalized grievance; that is, plaintiffs could only allege injuries as citizens and taxpayers. The Court concluded that ultimately it was for the political process to enforce this constitutional provision.

> Respondents seek to have the Judicial Branch to compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens. . . . [The] claimed nonobservance [with the Constitution] adversely affect[s] only the generalized interests of all citizens in constitutional governance and that is an abstract injury. . . . Our system of government leaves many crucial decisions to the political process. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.[78]

Likewise, a few years later in *Valley Forge Christian College v. Americans United for Church and State*,[79] the Court refused to rule on a claim that the federal government violated the First Amendment's prohibition against government es-

tablishment of religion. The government was alleged to have given over $500,000 worth of surplus property to a religious school. Despite the claim that a key provision of the Bill of Rights was violated, the Court held that taxpayers did not have sufficient injury to sue in federal court. Because it is difficult to imagine anyone's having a more specific injury than these taxpayers, the Court could never rule on the constitutionality of the executive's action. Justice Rehnquist, writing for the majority, stated:

> The complaint in this case shared a common deficiency with those in *Schlesinger* and *Richardson*. Although they claim that the Constitution has been violated, they claim nothing else. . . . We simply cannot see that respondents have alleged an injury of any kind, economic or otherwise, sufficient to confer standing.[80]

The effect of decisions such as *Richardson*, *Schlesinger*, and *Valley Forge* is to assign to the political branches the responsibility for interpreting and enforcing certain constitutional provisions. Although the plaintiffs claim that the government is blatantly violating the explicit words of the Constitution, the Court concluded that the matter was for the political process and not the judiciary to decide.[81]

These decisions leaving constitutional interpretation to other branches of government cannot be understood as conclusions required by the text of Article III, which limits the judiciary to resolving "cases and controversies." Article III limits the judiciary to cases and controversies, but there is nothing that says that cases such as these do not fit within that phrase.[82] The *cases* before the Court and the *controversies* over the meaning of specific constitutional provisions are sufficient to meet the textual requirements of Article III. Moreover, the Court in subsequent decisions has explicitly stated that the bar against federal courts hearing generalized grievances does *not* arise from the Constitution but rather is entirely prudential, reflecting what the Court deems to be prudent judicial policy.[83]

In addition to these standing rules, the political question doctrine allocates interpretation of some constitutional provisions to the electorally accountable branches of government. By declaring certain subject matter to pose a political question, the Court states that it will not rule on claims of unconstitutionality. The political branches are given the ultimate say as to the meaning of those provisions. In other words the political question doctrine is invoked by the courts to avoid ruling on a matter when it deems the resolution of the controversy to be committed to another branch of government.[84] Historically, the political question doctrine can be traced to Chief Justice John Marshall's opinion in *Marbury v. Madison*.

> By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. [A]nd whatever opinion may be entertained of the manner in which the discretion may be used, there still

exists, and can exist, no power to control that discretion. The subjects are political. . . . [B]eing entrusted to the executive, the decision of the executive is conclusive. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[85]

For example, the Supreme Court has held repeatedly that constitutional challenges to the conduct of foreign policy pose a political question.[86] In *Goldwater v. Carter*,[87] the Court refused to rule on the constitutionality of President Carter's rescission of the Taiwan treaty. Although it was claimed that the president's unilateral rescission violated the Constitution and usurped the Senate's powers, the Court, in a plurality opinion, concluded that the case "presented a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative branches of government."[88] Similarly, most cases challenging the constitutionality of the Vietnam War were dismissed on political question grounds.[89]

In addition, the Court has held that cases arising under Article IV, section 4's requirement that "[t]he United States shall guarantee to every State in this Union a Republican form of Government" pose a political question.[90] Again, this means that even claims of blatant violations will not be reviewed by the judiciary but instead will be left to the political process. The Court also ruled that questions related to the legality of constitutional amendments are to be left entirely to the political process.[91]

The net effect of these justiciability doctrines is that numerous constitutional provisions are interpreted and enforced only through the political process. This result is inconsistent with the most fundamental purpose of the Constitution: safeguarding matters from majority rule. Each part of the Constitution exists to protect something from easy change by political majorities. The statements and accounts clause, the incompatibility clause, the establishment clause, and the sections of the Constitution pertaining to foreign policy decision-making create certain requirements for the operation of government. These requirements are placed in the Constitution because they are deemed so important that government should not be able to ignore them or to alter them easily.

However, by assigning interpretation of these clauses to the political branches, their antimajoritarian function is undermined. The political branches are given exclusive authority to determine if there has been a constitutional violation. The legislature and executive can completely disregard a constitutional provision, which they arguably did in *Richardson*, *Schlesinger*, and *Valley Forge*. Moreover, the political branches that are accused of violating the Constitution are allowed to judge the constitutionality of their own behavior. No check exists. Nor is there the reasoned elaboration of the meaning of these constitutional provisions, something only the judiciary provides.

In dismissing cases because they present a generalized grievance or a political question, the Court repeatedly states that resolution of the specific constitutional controversy is left ultimately to the political process. This is undesirable because

the whole point of placing something in a constitution is to insulate it from the political process. In essence, some constitutional provisions are made meaningless.

The inappropriateness of allocating constitutional decision making to the political branches can be demonstrated by considering a recent proposal by Jesse Choper that all questions of separation of powers be deemed political questions and therefore not reviewable by the courts.[92] Choper contends that the courts should declare that litigation contesting the constitutionality of presidential actions is nonjusticiable.

> The federal judiciary should not decide constitutional questions concerning the respective powers of Congress and the president vis-à-vis one another; rather, the ultimate constitutional issues of whether executive action (or inaction) violates the prerogatives of Congress . . . should be held to be non-justiciable, their final resolution to be remitted to the interplay of the national political process.[93]

Choper's approach would leave all questions of separation of powers to resolution by the political branches.

Such an approach is inconsistent with a Constitution committed to protecting separation of powers. The Constitution creates the structure of government, in part, to prevent those in power from increasing their authority. Yet Choper's approach would allow the president to be given almost unlimited authority, usurping virtually all power allocated to Congress in the Constitution, so long as Congress agrees. For example, under Choper's approach, the Court could not declare unconstitutional the president's seizure of steel mills[94] or the president's impoundment of congressionally appropriated funds.[95] Unless Congress acted to stop the president, the executive could completely disregard the Constitution's allocation of powers to Congress.

Thus, Choper's approach sanctions an almost total transfer of legislative power to the executive so long as Congress does not object. Repeated congressional inaction would result in a tremendous shift of power to the White House. Such a growth in executive authority could threaten the entire system of checks and balances. As Justice Felix Frankfurter noted: "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority."[96]

Moreover, Choper's approach assumes that Congress has the authority to restrain unconstitutional presidential actions. If the president acts unconstitutionally, say by seizing an industry or impounding funds, what can Congress do? Congress could pass a statute directing the president to cease the unconstitutional activity. However, the president could veto the law. This means that Congress could stop the president only if two thirds of both houses of Congress were willing to act. Political realities, including support for a president from his or her own political party, might make such an override of a veto unlikely.

History shows that Congress is generally unwilling to restrain the president.[97] "[C]ongressional review of executive policy-making is sporadic, and the executive frequently makes policy without Congress' either taking responsibility for it or repudiating it. The result is a system sharply skewed towards executive policy-making."[98] Paul Gewirtz explains many reasons why Congress may not act even though a majority of its members disagree with the president:

> [W]hen Congress is faced with an executive policy that is in place and functioning, Congress often acquiesces in the executive's action for reasons which have nothing to do with the majority's preferences on the policy issues involved. . . . In such a situation, Congress may not want to be viewed as disruptive; or Congresspersons may not want to embarrass the President; or Congress may want to score political points by attacking the executive's action rather than accepting political responsibility for some action itself; or Congresspersons may be busy running for reelection or tending to constituents' individual problems; or Congress may be lazy and prefer another recess.[99]

In short, Choper's approach permits separation of powers to be rendered nonexistent. The Constitution's function of preventing the accumulation of power in one branch of government would be undermined. I believe that the judiciary should resolve claims that the President is acting in excess of the Constitution's grant of power to the executive and unconstitutionally usurping legislative power. Judicial review exists to protect the Constitution—including the provisions defining the structure of government—from majority rule. To ensure that the Constitution is protected from majoritarian pressures, the judiciary should be the authoritative interpreter of all provisions. The judiciary should abandon the justiciability doctrines, such as the generalized grievance standing requirement and the political question doctrine, which allocate interpretation of certain parts of the Constitution to the political branches. The courts should be the authoritative arbiter of the entire Constitution.

Several objections might be made to this conclusion. First, it might be argued that my approach is inconsistent with 200 years of judicial declarations that certain subjects pose a political question. Although I could respond by dismissing this objection as normatively irrelevant, I contend that it is Choper's approach that misconstrues the historical meaning of the political question doctrine when he claims that it should prevent the courts from deciding whether the president has usurped another branch's powers. The political question doctrine, as set forth in *Marbury v. Madison*, provides that the courts should not review an official's performance of duties in which he or she has discretion.[100] Only the exercise of lawful discretion should be unreviewable. Claims that an official is acting without constitutional authority or violating a constitutional provision are not political questions.

Phrased differently, in each case involving a separation of powers issue, the question is whether the official has the power to act and, if so, whether the act is discretionary or mandated by some external authority. The inquiries of whether

the official has the authority to act or an obligation to act in a particular manner are not political questions. Only if the act is discretionary is the official's conduct an unreviewable political question. As the Court declared in *Baker v. Carr*:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, of whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, *and is a responsibility* of this Court as ultimate interpreter of the Constitution.[101]

Thus, the political question doctrine simply precludes review of the exercise of discretionary power; it does not prevent a court from determining whether the executive's conduct is an unconstitutional usurpation of judicial or legislative power. Justice William Brennan explained that the political question "doctrine does not pertain when a court is faced with the *antecedent* question whether a political branch has been constitutionally delegated as the repository of political decision-making power. The issue of decision-making authority must be resolved as a matter of constitutional law, not political discretion; accordingly it falls within the competence of the courts."[102]

In other words, the president has discretion in choosing whom to appoint to office or whether to veto a bill. These decisions are obviously not judicially reviewable. These matters are what should be deemed political questions. The political question doctrine does not, and should not, require the judiciary to ignore claims that the president is violating the Constitution.

Second, it can be argued that the political question doctrine and allocation of constitutional decision making to the legislature or executive is desirable because other branches of government have special expertise for some subject matters. For example, it is argued that the president has special expertise in the area of foreign policy.[103] However, this only justifies deference to the executive's foreign policy choices and careful consideration of the president's expert opinions. There is no reason why the president's expertise requires complete abdication and total deference when there are allegations of unconstitutional actions.

Moreover, in most instances, the political question doctrine is invoked in situations where expertise is completely irrelevant. The question of whether the Vietnam War was unconstitutional because the president was waging war without a congressional declaration does not turn on foreign policy expertise. Rather, it poses a fairly standard constitutional question concerning the meaning of two abstract provisions: the president's power as commander in chief and the congressional power to declare war. Similarly, expertise does not justify judicial abdication in the generalized grievance cases where the Court defers to the political process. The question of whether it is unconstitutional for members of Congress to serve in the army reserves, the issue in the *Schlesinger* case, turns on an interpretation of a constitutional provision, not factual information possessed by an expert. The *Valley Forge* case required an interpretation of the establishment clause of the First Amendment—something at which the Court is most expert.

Third, it can be argued that there are some instances where the stakes are too high and the basis for judicial decisions are too unclear to permit court involvement. An example of this would be impeachment. If a president were impeached, should the Court review the case to determine if there were a "high crime or misdemeanor" or whether the proper procedures specified in Article I were followed? The argument is that the Court would exacerbate, not solve, a constitutional crisis if it declared unconstitutional the impeachment of a president. It is a nightmare to imagine a situation where the House impeached a president and the Senate voted for conviction, but the Court ruled that the president should remain in office. Thus, to avoid this possibility, it could be argued that the judiciary should deem itself to lack authority to review all impeachment cases.

Yet, I would argue that this is an argument for great caution and judicial deference, not for total noninvolvement no matter what the circumstances. What if a president were impeached for an act which was completely lawful and within his constitutional powers? Although perhaps unlikely, probability of occurrence is not the relevant test because it also is unlikely that the Court would declare an impeachment unconstitutional in the absence of compelling circumstances. Also, it must not be forgotten that Andrew Johnson was impeached and almost removed from office for exercising the Chief Executive's prerogative to remove Cabinet officers. Or what if the Senate declared a president to be convicted by less than a two-thirds vote, for example, on the basis of a committee's determination?

In such circumstances, judicial review is essential. It is primarily necessary to uphold the Constitution. The provisions dealing with impeachment become meaningless if the legislature can impeach by whatever procedures or standards it desires. Judicial involvement is also necessary to uphold the separation of powers. If the legislature could disregard the Constitution and impeach whenever it chooses, there is a danger of a great shift in power towards the legislature and a threat to the structure of government.

Again, to say that there is a judicial role does not speak to the substantive standards of review that the Court should use. Especially in situations like impeachment, great judicial deference on the merits is appropriate. But there is an enormous difference between automatically denying review in every case and, in contrast, hearing the case with a strong presumption in favor of the legislature's action.

Fourth, my conclusion that the Court should be the authoritative arbiter of all constitutional meaning can be challenged by arguing that the Court's self-interest should disqualify it from ruling on certain matters. Specifically, because constitutional amendments are the only way to overturn a Supreme Court decision, the judiciary, according to this argument, should not become involved in evaluating the constitutionality of the ratification process.[104] Justice Powell, for example, spoke of the dangers of having the Court "oversee the very constitutional process used to reverse [its] decisions."[105] Thus, in *Coleman v. Miller* a plurality of the justices declared that Congress has "sole and complete control over the amendment process, subject to no judicial review."[106]

Frankly, I find this the most persuasive case for the political question doctrine and judicial abdication, leaving Article V of the Constitution entirely to the political branches for enforcement. However, what if the political branches declare something to be a constitutional amendment even though it has not been ratified by the requisite three quarters of the states? Is the judiciary required to enforce the amendment as law even though it was improperly adopted? Consider a hypothetical situation. Congress, strongly desiring a particular constitutional change, coerces the states into ratifying the amendment, for example, by telling them that they will receive no federal monies until they approved the amendment. Furthermore, in this hypothetical situation, some of the states that originally ratified the amendment rescind their ratification. Nonetheless, Congress declares the amendment to be part of the Constitution. Should the Court simply defer to the congressional declaration? If so, a crucial aspect of constitutionalism—protection of the document from majority will—is lost. The very safeguards that the document provides, the difficulty of change, are rendered impotent if the political process is allowed to disregard Article V.

Nor is my hypothetical case fanciful. It is exactly what happened in adopting the Fourteenth Amendment. Congress, in the Reconstruction Act, stated that rebel states could not be readmitted to the Union unless they ratified the amendment.[107] Some of the ratifying states rescinded their ratification but nonetheless were counted toward the necessary three quarters of the states.

Perhaps above all else, if the Constitution is to serve as an antimajoritarian document, it is essential that Article V, which specifies the amendment process, be observed. It is the difficulty of amendment that makes the Constitution a powerful check on majority rule. Therefore, judicial review is necessary to ensure that the political process does not disregard the restrictions of Article V. Certainly, the Court should be extremely deferential when there are proposed amendments to overturn earlier judicial decisions. The Court must be careful not to use the power of interpretation to frustrate one of the only mechanisms existing to check the judiciary. But such deference should not be total abdication, which allows the violation of Article V.[108]

Finally, it might be argued that judicial restraint, such as that described by Choper, is necessary to protect the Court's legitimacy and credibility. Choper argues that the judiciary should not become involved in separation of powers or federalism issues so as to reserve its institutional influence for individual rights cases.[109] Choper's position follows the views of those, such as Alexander Bickel and Felix Frankfurter, who contend that the courts must preserve their institutional credibility by avoiding decisions that will draw the ire of the other branches of government.[110] They argue that owing to the judiciary's limited power to implement its decisions the courts must depend on voluntary compliance by the legislature and executive.[111] The amount of compliance that the courts can expect depends on the courts' credibility in the eyes of those whose behavior the courts seek to regulate. Accordingly, the courts must preserve their legitimacy by

avoiding involvements in controversies that will risk the courts' political capital.[112]

I wish to postpone a lengthy consideration of the issue of judicial credibility until the final chapter, where I analyze the objection that my conclusions would undermine the legitimacy of the Court. At this point, I simply want to point out the assumptions that Choper's argument makes. Choper apparently assumes that judicial decisions in separation of powers cases lessen the Court's credibility and legitimacy. Yet there is absolutely no evidence supporting this conclusion. To the contrary, the Court's ruling in cases such as *Youngstown Sheet and Tube v. Sawyer*[113] and *United States v. Nixon*[114] likely enhanced the Court's credibility. The decisions were highly respected and viewed as necessary checks on the president[115].

In fact, although judicial review is often criticized as being countermajoritarian, the courts actually perform a "promajoritarian" function when they act to control unconstitutional presidential acts.[116] The courts, by preserving congressional powers, help to ensure rule by the majority. Thus, judicial review of the presidency is at least as likely to enhance as it is to diminish the credibility of the courts.

Additionally, Choper assumes that the degree of lessened credibility will translate into disregard for judicial decisions. Although Choper offers examples where the judiciary was ignored,[117] there is no evidence that the decreased credibility from separation of powers or federalism rulings will be sufficient to cause increased disregard of Court decrees. In short, Choper offers no evidence that the Court's credibility is so fragile that a few unpopular separation of powers decisions will undermine its authority. Nor is there any evidence that the Court's separation of powers decisions undermine its institutional legitimacy more than its decisions in other areas.

Finally, Choper assumes that maintaining credibility is more important than upholding separation of powers or federalism. He must be assuming either that separation of powers is relatively unimportant or that the long-term benefits of Court rulings in other areas outweighs the need for judicial protection of the structure of government. Neither of these assumptions is supported.

This discussion has attempted to establish that the judiciary should be the authoritative interpreter of all constitutional provisions. For the Constitution to serve its function as a restraint on political majorities, there is a need for Court enforcement of its strictures. Furthermore, judicial elaboration is the best means for constitutional interpretation. It is undesirable to allocate constitutional decision making to other branches of government through the political question doctrine and the generalized grievance standing rule. The Constitution is best upheld if one branch, the judiciary, is the authoritative interpreter.

This page intentionally left blank

6 What Limits Exist on the Interpretive Process?

THE QUEST FOR DETERMINACY

Once it is decided that the Constitution should evolve by interpretation and that the judiciary should be the authoritative interpreter, a concern arises that there is a need to constrain judicial discretion in constitutional decision making. What limits exist on the judiciary as it gives meaning and effect to specific constitutional provisions? The obsession of modern constitutional law scholarship has been to try to devise constraints on the interpretive process.[1] The goal has been to articulate a model of judicial decision making that informs the courts how to rule in particular cases and prevents courts from deciding issues based solely on the values of the individual judges. The search has been for "sources of decisions external to the decider's own or 'subjective' standards of value."[2]

Conservative critics argue that decisions based on the personal values of the judges are illegitimate in a democracy committed to majority rule.[3] Judge Robert Bork, for example, writes that "a Court which makes rather than implements value choices cannot be squared with a democratic society. . . . We are driven to the conclusion that a legitimate Court must be controlled by principles exterior to the will of the Justices."[4] Conservatives objected to the activism of the Warren Court by claiming that the Court was imposing its own political preferences.

At the same time, critics from the Left, such as Mark Tushnet, argue that liberalism "requires adjudication without regard to the values held by the adjudicators."[5] They argue that the liberal premise of government under law cannot co-exist with a judiciary that imposes the personal views of its members. Tushnet argues that the inherent inability to prevent judges from imposing their own values is an important illustration of the contradictions inherent in liberalism.[6]

In response to the critics from the Right and the Left, constitutional scholars

have tried mightily to devise a method of judicial review that constrains the judiciary and prevents judges from deciding cases based on their personal ideologies. They have searched for a method that provides determinacy, that directs the Court how to rule in particular cases. Their goal is a model that allows no judicial discretion, for discretion permits the introduction of the judges' ideologies. As Larry Simon explains:

> During much of this century . . . the task of explaining the function of constitutional law came to be conflated with a search for a way of constraining the Justices. . . . For this reason, many judges, lawyers, and scholars have yearned for 'objectivity' in constitutional judgement.[7]

In this context, *determinacy* refers to a method of constitutional decision making that allows justices to decide cases without regard to their own values. A model is determinate if any two judges using it would come to identical results. Judicial discretion is the antithesis of determinacy. The cry for objectivity is a demand for determinacy—a search for a way in which justices can determine constitutional rules based on "principles" external to their views.

In fact, constitutional theorists have developed a number of theories of judicial review, each designed to avoid judges deciding cases based on their personal values. To a large extent, each theory was developed because the prior theories failed to provide determinacy. Literalism is the view that all constitutional interpretation must be based solely on the constitutional text.[8] Under this approach, no extraconstitutional materials are relevant. Instead, the Court's task is "to lay the Article of the Constitution which is involved beside the statute which is challenged and to decide whether the latter squares with the former."[9] Justice Hugo Black, for example, argued that judicial decisions are illegitimate if based on anything other than the text of the Constitution.[10]

Originalism is a theory that "accords binding authority to the text of the Constitution or the intention of its adopters."[11] Unlike literalism, originalism permits the Court to look beyond the language of the Constitution but limits it to ascertaining the meaning that the Framers intended.[12] Under this approach, "[t]he whole aim of construction, as applied to a provision of the Constitution . . . is . . . to ascertain and give effect to the intent of its framers and the people who adopted it."[13] In other words, the meaning of the Constitution is static until amended; the only relevant sources of constitutional interpretation are the language of a provision and its preratification history.

Conceptualism requires the Court to determine the underlying purpose of a constitutional provision and to apply this purpose in developing modern governing principles.[14] Unlike 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.[15] Each constitutional provision has a core meaning that is static, which the courts apply to modern circumstances.[16]

Cultural values theories require the Court to use basic social values not expressed in the constitutional text as the basis for constitutional decision making.[17] Some culture value theorists argue that the Court should find cultural values in U.S. traditions;[18] others argue that they should be found in moral consensus[19] or in the natural law.[20] Although the source of the values is quite different under these theories, the common characteristic of these approaches is that the Court interprets constitutional provisions on the basis of values not necessarily expressed in the test of the Framer's interpretation.

Finally, process-based modernism permits the Court to decide cases based on contemporary values but limits such discretion to improving the process of government by ensuring fair representation or adjudication.[21] Under this theory, the Court must use the originalism paradigm except for matters that relate to the fair process of government. In this area, the Court may act on norms not mentioned in the Constitution or intended by the Framers.[22] This theory has been advanced most prominently by John Hart Ely and was discussed previously in chapter 1.[23] There are other process-based theories in addition to Ely's, though his is undoubtedly the most prominent.

Each of these approaches is offered as a way to constrain judicial discretion. Each, it is argued, provides an alternative to judges deciding cases based on their personal ideologies. As Ely explains: "[F]ew come right out and argue for the judge's own values as a source of constitutional judgment. Instead the search purports to be objective and value neutral; the reference is to something 'out there' waiting to be discovered."[24] The quest is for determinacy: a model of judicial review that unequivocally informs the Court when to become involved, what values to protect, and what result to reach.

Each of these approaches might be thought of as an alternative to a model termed *open-ended modernism*—an approach that permits the Court to give meaning to all constitutional provisions on the basis of contemporary values that the justices regard as worthy of constitutional protection. Under open-ended modernism, the Constitution is viewed as outlining basic concerns—separation of powers, freedom of speech, protection of criminal defendants—and the Court in each generation is entrusted to give content and meaning to them in their application to contemporary situations.

The core characteristic of open-ended modernism is its explicit premise that justices have, and should have, discretion in deciding constitutional cases, and that their decisions are inevitably based on their personal values. Open-ended modernism is not inconsistent with the use of many of the above methodologies, except to the extent that the alternatives are predicated on the belief that they significantly constrain judicial decision making. For example, an open-ended modernist could decide to identify the concept behind constitutional provisions and decide particular cases on the basis of contemporary conceptions. An open-ended modernist could choose what values are worthy of constitutional protection on the basis of natural law theories, or on the basis of tradition, or on the basis of deeply embedded cultural values, or on the basis of process values.

But the open-ended modernist would recognize that whatever the endeavor, decision making inescapably involves personal value choices by the individual judge.

THE IMPOSSIBILITY OF DETERMINACY

The search for determinacy is inherently futile. No model of constitutional decision making can provide both constitutional evolution by interpretation and determinate results. Constitutional interpretation is an inherently open-ended process, with judges accorded great discretion in determining what values are so important that they should be constitutionalized and therefore immunized from majority pressures. Although there are different degrees of indeterminacy, all methods of constitutional interpretation are nonobjective in the sense that all require choices that inevitably are influenced by the justices' values. The constant search for a model that yields constitutional principles without regard to the identity of the justices is misguided.

Ronald Dworkin explains what it means to say that a judge has discretion in this sense:

> An official's discretion means not that he is free to decide without recourse to standards of sense and fairness, but only that his decision is not controlled by a standard furnished by the particular authority we have in mind when we raise the question of discretion.[25]

In other words, all would agree that a court's discretion is limited in some ways. The judge should not rule based on what is best for his or her own financial interests or his or her affection or dislike for particular litigants.[26] However, apart from these constraints, discretion exists and there is not a method of decision making that allows decisions without judges making choices—choices that inherently will be influenced by the judge's own ideology.

Judicial decision making would be discretionless only if two things existed. First, there would need to be absolutely clear premises, constitutional rules, that permitted the decision maker no discretion in determining the meaning of the premises. For each case, there would need to be just one premise (a choice of more than one premise would create discretion), and that premise would have to be completely unambiguous (since ambiguity requires choices in meaning). Second, there would need to be a reasoning process that allows results to be determined entirely by deduction from the premises. Unless courts could apply the premises to particular cases in a syllogistic fashion, judges would have discretion in determining the outcome. In other words, determinacy exists only if there is a clear rule that can be applied deductively to determine the result in a specific case. This method of decision making has long been termed *formalism*.[27]

At least since the time of the legal realists at the beginning of this century, formalism has been regarded, almost universally, as impossible. First, the con-

stitutional premises from which results are deduced are rarely clear. No model of constitutional decision making can eliminate the need for courts to make choices as to what a constitutional provision means. For example, the inherent vagueness and ambiguity of language require courts to make choices in deciding the meaning of a provision.[28] As Chief Justice Marshall noted early in U.S. constitutional history, "Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense."[29]

The choice to have a constitution written in abstract, general language—something that allows it to serve as a constitutive document—ensures that choices must be made in giving specific content to individual provisions. This indeterminacy is especially apparent in phrases like "due process of law," "freedom of speech," "equal protection," "cruel and unusual punishment," and "privileges and immunities of citizens." Because these terms have no determinate meaning, a literal reading of the Constitution cannot guide the Court in construing them. Inevitably, the judiciary must make choices as to what meaning to give these terms.

Even the constitutional language that is more specific is indeterminate. Article I of the Constitution grants Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution . . . [its] powers."[30] Does "necessary" mean "indispensable"—that Congress may take only those actions essential to implementing its powers? Or does "necessary" mean that Congress can take any action that can be viewed rationally as implementing its powers?[31] Similarly, what government actions constitute a "taking of property"? What actions of state governments constitute an "impairment of the obligation of contracts"? What is an "unreasonable search and seizure"?

These examples and countless similar ones illustrate that the general nature of the Constitution's language requires choices as to meaning. H. L. A. Hart argues that the inherent limitations and defects of language ensure that rules will be drafted in "open-textured" language that makes interpretation inevitable.[32] Hart argues that the open texture of language necessitates judicial discretion.

> The open texture of law means that there are areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which may vary in weight from case to case.[33]

Even the most specific language in the Constitution does not eliminate judicial discretion. For instance, Perry distinguishes value judgments that go beyond the Constitution from those that go against the Constitution.[34] According to Perry, the latter, termed "contra-constitutional judgments," are deemed impermissible. The assumption is that some things are specified by the language of the document and that the Court cannot ignore or overrule that which is specified.

However, even the most specific language in the Constitution might be modified through interpretation. For example, perhaps the least ambiguous constitu-

tional provisions are those that specify the required age for election to the House of Representatives, the Senate, and the presidency. Yet it is not inconceivable that the Court could decide that these age restrictions are altered by the equal protection guarantees of the Fifth Amendment, with the amendment modifying the text of the document.[35] Or the Court could conclude that the ages specified were meant to refer to a percentage of the human life span, which has changed since the Constitution was written. The latter possibility is not as implausible as it sounds. Recently, an Illinois appellate court held that a statute applying to those under the age of 13 could apply to a retarded boy of 16 because what the statute really referred to (though never specified) was mental age.[36]

I am not suggesting that all language is equally ambiguous or that courts do not have to justify ignoring seemingly clear wording. The greater the apparent clarity, the more important the reasons need to be to justify disregarding the text. Nor do I contend that the federal courts are likely in the foreseeable future to invalidate the age provisions contained in the federal Constitution. Rather, I am arguing that all constitutional provisions, even seemingly unambiguous ones, might present questions of interpretation. This makes a clear distinction between extraconstitutional and contraconstitutional interpretation impossible. Language, even in its most precise form, cannot eliminate all discretion or foreclose the possibility of interpretation.

Nor can the indeterminacy of language be overcome by resort to the intention of the Constitution's Framers. At the very least, reliance on the Framers' intent to determine constitutional values would mean that the Constitution has a static meaning, fixed to what the drafters intended. Chapters 3 and 4 demonstrated why such an approach is undesirable and why it is preferable to have the Constitution evolve by interpretation—which prevents reliance on the Framers' intent to eliminate judicial discretion.

Moreover, as argued in Chapter 3, embracing originalism would neither eliminate judicial discretion nor provide determinacy in constitutional decision making. Numerous people were involved in the drafting and ratification of each part of the Constitution. Choices must be made as to whose views count as intent.[37] Even if the relevant group could be identified, those regarded as Framers undoubtedly had a number of different and perhaps conflicting reasons for adopting a particular constitutional provision. Social choice theorists prove that it is impossible to determine a group's preferences based on the preferences of individual members of a group.[38] Choices must be made as to which views count as intent. Additionally, historiographers argue that any reading of historical records is inherently subjective, with the values of the interpreter affecting the conclusions reached. Thus, originalism does not eliminate judicial discretion nor provide determinacy in determining the premises for constitutional decision making.

Nor do any of the other models of judicial review end discretion or permit determinacy. Conceptualism is indeterminate because the Court can state the concept behind any constitutional provision at many different levels of generality.[39] As described in Chapter 4, the concept behind the equal protection clause

might be to protect former slaves; or it might be to protect blacks; or it might be to protect all racial minorities; or it might be to protect all "insular" political minorities; or it might be to require that all government classifications be justified by a legitimate government purpose.[40] The result in specific cases will depend on the level of generality at which the concept is articulated. For example, whether the equal protection clause applies to gender discrimination turns entirely on the choice of the concept behind the provision. As Paul Brest observed, the "fact is that all adjudication requires making choices among the levels of generality on which to articulate principles and all such choices are inherently non-neutral."[41] Thus, conceptualism does not eliminate discretion or provide determinacy because it "demands an arbitrary choice among levels of abstraction."[42]

Recognizing the failure of these approaches, some theorists have abandoned constitutional interpretation based on the Framers' intent. Instead, they try to provide an external source for judicial decision making by arguing that the Court should look to "deeply embedded cultural values" in interpreting the Constitution.[43] They propose various sources for determining such values, including natural law, tradition, and consensus.[44] However, all these sources of decision making are indeterminate, permitting judges to justify reaching virtually any result. Although I agree that the Court's function is to articulate fundamental values and protect them from majority rule, these theories provide no constraint on judicial decision making. Cultural values can be identified to support almost every conclusion. Judges acting in completely good faith can support almost any conclusion by invoking some aspect of U.S. culture and traditions. In fact, in practice, cultural values theories are indistinguishable from "open-ended modernism," although the cultural values theories do describe the rhetoric the Court should use in justifying its results.

Natural law, for example, is not composed of specific, judicially discoverable principles. To the contrary, people can claim that any idea is part of the natural order. As Ely explains, "[N]atural law has been summoned in support of all manner of causes in this country—some worthy, others nefarious—and often on both sides of the same issue."[45] Ely offers an excellent example: the Supreme Court's decision in *Bradwell v. Illinois* where the Court declared: "The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator."[46] Asking judges to follow natural law gives them license to decide the values they believe should be protected.

Nor is the requirement that the Court look to tradition a constraint on judicial decision making. U.S. history is so diverse that almost any value can be found in some tradition. As Garry Wills notes, "Running men out of town on a rail is at least as much an American tradition as declaring unalienable rights."[47] Discrimination against blacks and women is far more a U.S. tradition than is egalitarianism. Permitting decisions based on tradition allows the Court to justify its arbitrary choices simply by invoking a historical practice as support.

Finally, those who argue that the Court should look to social consensus in

deciding what values to protect do not mean that the Court should identify constitutional values based on the Gallup Poll. As Ely explains, "[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."[48] Instead, consensus theorists refer to a deep, underlying consensus to basic values that transcends current viewpoints. Margaret Jane Radin observes that what is really the source of values is a "notion of [a] deep or coherent consensus."[49] Likewise, Harry Wellington rejects simple consensus in the form of the majority's current preferences and instead says courts must be "reasonably confident that they draw on conventional morality and screen out contemporary bias, passion, and prejudice."[50] In short, what consensus really means in the context of constitutional decision making is that deeply embedded in our society there is a long-term, underlying consensus that courts should look to as a source of rights.

The process of identifying this deep consensus is inherently indeterminate. There is no formula that a court can use to ascertain what the deep consensus is. Undoubtedly, a person "can convince one's self that some invocable consensus supports almost any position a civilized person might want to see supported."[51] I am not arguing that courts should refrain from trying to ascertain the deep consensus or from protecting cultural values. Rather, my claim is just that such an approach does not avoid the need for judges to use their own values in deciding constitutional principles.

Finally, process-based modernism, too, fails to provide courts with a discretion-free way of determining premises for constitutional decision making. Process-based modernism allows the courts to use contemporary norms in deciding cases, but only in creating a fair process of government—that is, what is fair adjudication and representation. As discussed in Chapter 1, this theory is indeterminate, first, because it provides no basis for judicial decisions under the substantive provisions of the Constitution.[52] What standards *should* the Court use in deciding what is a "cruel and unusual punishment," or what is a "taking" of property, or what constitutes the "establishment" of religion? All such decisions require judicial choices. Second, the judiciary has discretion in deciding what is a fair process. There are no preexisting criteria that lead to determinate results in deciding what is a fair electoral process or what rights criminal suspects should possess.

The point of this discussion is to establish that there is no way to eliminate judicial discretion in determining the premises for constitutional decision making. No matter what model is adopted, judicial choices, undoubtedly influenced by the judges' ideology, are inevitable. I am not arguing that all theories necessarily allow judges the same degree of discretion. One theory might be indeterminate because it allows a choice among several alternatives, whereas another might allow selection among a great many more choices. Instead, the claim is a more limited one: the goal of judicial decisions based totally on sources extrinsic to the judges' own values is unattainable.

Furthermore, the primary difference in the discretion allowed is between the

originalist theories and the nonoriginalist ones. Requiring judges to defend their conclusions based on the text or the Framers' intent does confine judges more than allowing them to reach any result that can be justified by invoking tradition or consensus. If, however, originalist theories are rejected for the reasons discussed in earlier chapters, I contend there is relatively little difference among the nonoriginalist theories in the degree of discretion accorded to the Court. Whether judges choose the concepts and the conceptions, or determine the deep consensus, or identify traditions, they are engaging in a process which is very heavily dependent on their own values and beliefs about what is so important as to be worthy of constitutional protection. Because concepts, natural law premises, deeply embedded values, and traditions all can be stated at very high degrees of abstraction, conscientious judges could use them interchangeably to reach the same results. For example, consider the Court's discretion under each of these theories in determining whether there is a right to privacy. The concept behind the Fourth Amendment can be said to be privacy. Privacy can be viewed as an integral part of America's traditions. Certainly, privacy could be regarded to be a value that is part of the deep consensus of our culture. I cannot identify any difference in the discretion allowed, the range of choices permitted, under these nonoriginalist theories.

The choice among these theories is ultimately a decision based on considerations such as one's philosophical beliefs (is there a belief in a natural law or the existence of a deep consensus?) and rhetorical choices (will a court articulating its decision on considerations of social traditions or underlying concepts be more likely to gain acceptance of its decisions?) My point is that it is wrong to choose among the nonoriginalist theories based on a desire to constrain judicial decision making.

Furthermore, even if the premises, the Constitution's requirements, were clear, inevitably judges would still have discretion in applying the premises to decide specific controversies. Discretion is eliminated only if the premises can be applied deductively to yield conclusions. However, legal reasoning is rarely syllogistic. Generally, legal reasoning is described as being analogical, reasoning by example from one case to the next. Edward Levi provides a classic description of legal reasoning:

> The basic pattern of legal reasoning is reasoning by example. It is reasoning from case to case. It is a three-step process . . . in which a proposition descriptive of the first case is made into a rule of law and then applied to a next similar situation. The steps are these: similarity is seen between cases; next the rule of law inherent to the first case is announced; then the rule of law is made applicable to the second case.[53]

This inductive method is inherently discretionary. Courts must make choices in deciding whether cases are similar or dissimilar. Under the Fourteenth Amendment, is discrimination against women or aliens or the handicapped to be treated the same or differently from discrimination against blacks? Is the need for govern-

ment-provided counsel the same in misdemeanor cases as in felonies, or is there a relevant difference? Deciding whether a precedent is controlling or distinguishable inevitably requires the Court to make a choice that cannot be arrived at deductively.

Additionally, the process of articulating the principle that the former case establishes is inherently discretionary. Every first-year law student quickly learns that the holding of any case can be stated at many different levels of abstraction and generality. The reasoning process described by Levi ensures judicial choices.

Furthermore, much of constitutional decision making is resolving conflicts between constitutional values, a process that is much more likely to involve balancing than deduction. For instance, many constitutional law cases involve tensions between constitutionally protected liberty and constitutionally guaranteed equality. May the state prevent a group such as the Jaycees[54] or a private school[55] from discriminating? There is a tension between the group members' right to freedom of association and the individual's right to equal protection. Often constitutional law involves conflicts between constitutionally protected liberties. For example, what may courts do to prevent prejudicial pretrial publicity and ensure fair trials?[56] Restrictions on the press threaten First Amendment values; the absence of controls on pretrial publicity threatens the defendant's Sixth Amendment right to a fair trial. Some parts of the Constitution are written in language that ensures value conflicts. For example, any time the government acts with the purpose of facilitating religious worship, arguably it is establishing a religion.[57] On the other hand, the government's failure to accommodate religion (for example, by not providing chaplains for prisoners or soldiers), arguably denies free exercise of religion.

Choosing between competing constitutional values is inherently discretionary. No reasoning process exists to ensure determinate results. A choice must be made and the process of choosing inevitably permits the judge's ideology to influence the outcome. Likewise, because no constitutional rights are treated as absolute, a potential issue in every case is whether there is a sufficiently compelling rationale to justify infringement of the right. Deductive reasoning cannot disclose what interests are important enough to outweigh constitutional values.

Thus, the search for determinacy that has obsessed constitutional scholarship is misguided. No model of judicial review can eliminate discretion in the identification of constitutional values and their application in particular cases. The existence of discretion ensures that the judges' values will influence the outcome. Value-free decision making is an impossible quest. John Nowak explains that there is "no demonstrably correct set of legal principles which will dictate the resolution of constitutional issues apart from the political philosophy and the exercise of political power by the justices."[58] Similarly, Perry concludes, "Inevitably each justice will deal with human rights problems in terms of particular political-moral criteria that are, in the justices' view, authoritative. I do not see how it could be otherwise. . . . [T]he ultimate source of decisional norms is the judge's own values."[59]

Again, establishing that all theories are indeterminate only demonstrates that under each, justices have discretion to make choices that inescapably will be influenced by their own values. But showing that all judicial review is indeterminate does not prove that every approach accords judges the same amount of discretion. I readily admit that one of the differences between originalism and non—originalism is in the degree of discretion allowed. In fact, in choosing among the theories one could conclude that the "basic question from the standpoint of American constitutionalism is how much discretionary power the people are willing to consign to the judges."[60]

Earlier, in Chapter 4, I detailed reasons why the degree of discretion permitted under originalism is inadequate to achieve the underlying purposes of the Constitution. Here my point is that originalists cannot defend their paradigm by arguing that it produces determinate results or eliminates discretion. If the search for determinacy and objectivity were not so prominent in much of the constitutional law literature, I would fear that this discussion would be dismissed as merely attacking a straw man. Yet, it is precisely because nonoriginalist theories are so frequently criticized as allowing judges to make decisions based on their personal values that it is important to note that all theories of decision making are susceptible to this criticism. No theory can claim the ability to provide value-neutral adjudication.

To this point, I have only demonstrated that it is futile to search for determinacy and misguided to criticize any particular theory because it allows the individual judge's values to influence decision making. The ideology of the judges determines results under all approaches. The next question to be addressed is whether judicial discretion is something to be minimized to the greatest extent possible, such as under originalism, or whether expanding the judicial discretion of nonoriginalism is desirable. Phrased in other words, thus far in this chapter, I have established only the descriptive proposition that judicial discretion is inevitable once it is decided that the judiciary should interpret the Constitution. This conclusion, of course, has no normative force. I would argue further, in response to the critics from both the Right and the Left, that judicial discretion is desirable in constitutional decision making.

THE DESIRABILITY OF DISCRETION

How much discretion should be accorded the judiciary in constitutional interpretation? A truly honest answer would be that it depends on the identity of the justices. When there are justices I like (whose values I agree with), I want them to have a great deal of discretion. But if the justices' beliefs are contrary to mine, I want to restrain them. This simple observation explains much of modern constitutional scholarship. It is no coincidence that conservatives who dislike the results of Supreme Court decisions desegregating the schools, protecting access to contraceptives and abortion, limiting state support for religion, upholding the rights of criminal defendants, and the like, now argue for the theories of judicial

review entailing the least discretion. Nor is it surprising that during the 1930s, when the Supreme Court struck down countless progressive laws, it was the liberals who espoused originalism. The degree of discretion a person wants the judiciary to have really comes down to whether one believes that it will lead to more good or more bad results.

Ultimately, then, choosing the appropriate degree of discretion is a matter of defending a view of what is a "good" or "bad" result and making a prediction about what kinds of people will likely be appointed to the bench and how they will behave in office. The more one believes that the future justices will advance the good, the more discretion a person is willing to accord the Court. But the more it seems that the Court's future members will retard social progress or cause bad results for society, the more one wants to limit the judiciary's ability to cause harm.

Such a discussion about what is a good or a bad result requires exposition of a moral or political theory. I, however, certainly am not prepared to present a well-developed account of what is "the good" or "the just," an account that would probably occupy several volumes in itself. But I contend that even without a full exposition of a political theory, the conclusions established in the earlier chapters justify the belief that judicial discretion, on balance, will lead to good results for society.

Specifically, Chapter 2 established that the existence of a constitution reflects society's commitment to protecting fundamental values and the rights of political and social minorities from majority rule. Chapters 3 and 4 described why achieving these objectives requires a constitution that evolves by judicial interpretation. Protecting minorities and safeguarding basic rights from current threats necessitates that the interpretive process be open-ended. As Chapter 4 established, a constitution that evolves only by amendment—according the judiciary relatively little discretion—is inferior to a process of evolution by interpretation. Reducing judicial discretion keeps the Court from protecting crucial values and minority groups. Thus, as discussed in Chapter 4, constitutional decision making requires choices as to what modern values are so important that they are worthy of constitutional protection.

Furthermore, Chapter 2 described the social benefits of having a constitution written sufficiently abstractly that almost everyone agrees to the values it contains. Such a document serves important symbolic and unifying functions. However, the very fact that the document is abstract means that the interpretation process will be open-ended, as judges decide what specific content to give to general provisions. Discretion is inherent, and an originalist methodology is precluded under such a constitution because the text and the Framers' intent are usually too ambiguous to guide interpretation.

In other words, if the conclusions from the earlier chapters are accepted, the desirability of discretion follows. Judges in interpreting the Constitution should identify and articulate those crucial values deserving protection from majoritarian decision making. The conclusion is that society is better off having an institution

insulated from the political process, such as the judiciary, determine what values are worthy of constitutional protection. Society is better off because the Court had discretion to compel desegregation of the South, to apply the Bill of Rights to the states, and to protect the right of privacy, to mention just a few examples. There is a risk that discretion will be used for bad ends and produce undesirable results. The specter of Lochnerism haunts all defenses of judicial discretion. But, as I argue later in this chapter, the judicial method of decision making and historical experience convince me that on balance society is better off having an institution like the Court expound and interpret the meaning of the Constitution. Contrary to those who claim that is is a criticism of the judiciary to reveal its discretion, I contend that society benefits from the judiciary's ability to identify and protect minorities and basic rights.

What makes a legislator different from a judge is not that only the former makes value choices.[61] Obviously, both must do so. A court is different from a legislature because the judiciary is insulated from electoral politics and the legislature is not. Also, a court is different because its primary role is to enforce and uphold the Constitution, not to please constituents or to seek reelection. A court, moreover, is different in its method, its process of deciding based on arguments with elaboration of reasons justifying the result. It is precisely these differences that make the judiciary the proper institution for constitutional interpretation.

The conclusion that judges make value choices is hardly new or profound. The legal realists pointed this out decades ago. Why, then, is there so much aversion to this conclusion and so much effort devoted to developing models to try to eliminate judicial discretion? Perhaps there is a psychological need for certainty, a need to believe that there are determinate answers to be found.[62] Perhaps it is that open acceptance of broad judicial discretion does create tension with important social values and even with the underlying rationale for having the Constitution. Even though majority rule is not the sole component of a correct definition of American democracy, it is an important aspect. Broad judicial discretion, albeit advancing the Constitution's underlying values, is in tension with a desire for majoritarian decision making. Moreover, if a primary purpose of the Constitution is "pre-commitment" to basic values, how much is there really a pre-commitment to anything if the Justices have broad discretion to determine the meaning of the Constitution?

These objections cannot be dismissed lightly or brushed aside. As to the concern for majority rule, the answer must be found in the justifications for having a Constitution: it is desirable for society to exempt some deeply cared about matters from majoritarian control. Some values, such as separation of powers, equality and individual rights, are deemed more important than majority rule. As argued above, to protect these values adequately requires a Constitution that evolves by interpretation and that necessitates substantial judicial discretion.

Even more troubling is the argument that the existence of judicial discretion undermines the purposes of a Constitution. The Constitution's goal of protecting basic values from majority rule is lost if the Court can follow the wishes of the

majority in its decision making and abandon minorities and individual liberties. More generally, if a Constitution represents society's tying its hand to prevent future harm (as argued in Chapter 2), are those binds very meaningful if the Court can cut them at will? A paradox seems to emerge: for the Constitution to achieve its purpose the Court must have substantial discretion; but if the Court has substantial discretion can the Constitution achieve its basic purpose of serving as a precommitment and constraint for society?

I do not have an easy answer. There is an inherent tension between wanting to prevent change to preserve basic values, and wanting to allow change to permit progress. Yet, I believe that the Constitution and the judiciary with substantial discretion to interpret it offers the best mediation of this tension. The Constitution embodies society's commitment to fundamental values. If the legislature could overrule those values at will, there would be little preservation of the precommitment. Alternatively, as argued in Chapter 3 and 4, if there was no opportunity for evolution by interpretation, technological and moral progress would make the Constitution outdated and a failure at protecting its basic values.

Judicial interpretation offers a compromise between the two undesirable possibilities. There is evolution by interpretation, yet there also is a check on the majority in its ability to disregard the Constitution. As argued in Chapter 5, the judiciary's methods of decision making make it especially well-suited to the task of articulating and applying the Constitution. The commitment to basic values is preserved and enhanced by the judiciary's ability to give them contemporary meaning and, at the same time, there is some insulation from majoritarian pressure. Certainly, at any given point in time, this balance might not work. The Court, itself, might fall prey to social pressures or it might fail to adapt sufficiently to changed circumstances. Yet, my argument is that over the long term, the best way to mediate the fundamental tension between commitment and change is through a Constitution and a judiciary whose role is to preserve, protect, and advance the Constitution's values.

Yet another reason for the quest for limits on the interpretive process reflects a fear of judicial tyranny. U.S. government is premised on a distrust of those in power.[63] The structure of government embodied in the Constitution reflects a belief in the need to limit and check power. The search for limits on the judiciary is thus part of the desire to constrain all who hold positions of authority. If a model of decision making exists that allows no discretion, then there is no need to fear judicial decisions. In contrast, a judiciary that possesses great discretion and is not easily checked by any other institution creates fear of tyrannical rule.

This objection cannot be dismissed lightly; defending the existence of expansive judicial discretion requires that fear of judicial power be addressed directly. At the outset, it is necessary to clarify what *judicial tyranny* means. After all, *tyranny* is a loaded word, carrying extremely negative connotations. Does *judicial tyranny* mean that the Court will become a despotic dictator, running the country by fiat? This seems unlikely because the Court cannot act directly and can only rule on those cases before it. Obviously, the Court cannot arrest people,

confiscate property, or declare war. As Alexander Bickel remarked, "[H]uge areas of governmental action remain wholly outside the Court's reach."[64] Moreover, if the Court orders Congress or the president to act tyrannically, each can ignore the order. "Government by judiciary" is an obvious exaggeration and misnomer.[65]

Judicial tyranny can be understood only as a fear that the Court will frustrate the will of the majority by striking down socially desirable legislation on the basis of misguided constitutional interpretations. This is a legitimate fear, but it is the specific concern over misguided judicial activism that must be analyzed, not some vague notion of *tyranny*. Of course, it is difficult to even speak of errors or mistakes unless there are some criteria to separate good decisions from bad ones. For the purposes of this discussion, *errors* or *mistakes* simply refers to judicial opinions widely regarded by the interpretive community to be wrong, or to judgments that come to be regarded by history as manifestly incorrect. Although I recognize that this definition begs crucial questions about what is a good decision, I am simply using it to have some sense of what *errors* and *mistakes* might mean in the context of judicial decisions.

In considering the concern about judicial tyranny, it should be recognized that the Court is not tyrannical merely because it acts in an antimajoritarian fashion, for judicial review is supposed to be antimajoritarian. Rather, the concern is that the Court will strike down socially important legislation based on misguided interpretations—mistakes that cannot be corrected easily because of the difficulty of overruling constitutional decisions through the amendment process. In fact, this fear seems to be the underlying motive for almost all contemporary constitutional theory. The desire to devise a model that limits judicial discretion is inspired by the perceived need to constrain the Court and avoid another Lochner era.[66] For fifty years, from 1887 until 1937, the Court struck down progressive state and federal legislation designed to protect consumers and workers. Most modern commentators view the Court's zealous protection of laizzez-faire capitalism during the Lochner era as a mistake.[67] Thus, scholars are searching for a theory that will permit judicial review without the risk of Lochnerism.

It cannot be overemphasized that the fear of Lochnerism is the driving force behind modern constitutional theory and especially the search for limits on the interpretive process. Ely, for example, stated that it is "most imperative for liberals to distinguish *Lochner v. New York*" from decisions such as *Griswold v. Connecticut* and *Roe v. Wade*.[68] Likewise, Monaghan remarked that "[i]f you conclude . . . that you can't distinguish *Lochner* from *Roe*, that might tell you something about the legitimacy of noninterpretive modes of reasoning about the Constitution."[69]

Initially, it must be recognized that although judicial errors are possible, so are legislative and executive ones.[70] Fiss notes that "[h]istory is as filled with legislative and executive mistakes as it is filled with judicial ones."[71] Also, errors—even blatant disregard of the Constitution—by state and local governments have occurred throughout U.S. history.[72] Few would deny that political officials have

frequently violated rights, discriminated, and acted unconstitutionally. One feature of U.S. government that makes the Constitution particularly necessary is federalism, the decentralization of power to state and local governments and the need to ensure that these nonfederal officials stay within the Constitution's limits.

The crucial question becomes, Which risk of errors is more acceptable? Is society better off limiting judicial review and trusting the majority to restrain itself and to not violate fundamental rights or discriminate against minorities not explicitly protected in the text? Or should society grant the power of judicial review and trust the Court not to err by unjustly overruling desirable social policies? Given that any institution can make mistakes, the issue is what institution's errors pose less risk. Tribe explains the choice:

> The price we pay is that, for various periods of time, an enlightened consensus may be blocked by judicial adherence to constitutional views we will later come to regret. But the price of the alternative course is that, for other periods, the enlightened consensus that judges may help to catalyze in the name of the Constitution might be blocked by more self-interested or self-serving majorities.[73]

In other words, the danger of judicial review is court obstruction of social progress; the price of not having relatively broad judicial discretion is that political majorities are able to violate basic values and discriminate against groups deserving of protection. If Lochnerism is the cost of judicial discretion, then the benefits are reflected in decisions such as those striking down the Jim Crow laws that segregated the South, reapportioning legislatures, and ensuring defendants of counsel in criminal cases. Ultimately, are the values of judicial discretion worth the risks?

In examining this balance, it is important to recognize that if the Court is denied discretion in order to prevent mistakes, it also is denied discretion to make good decisions.[74] For example, without judicial discretion, without a constitution that evolves by interpretation, the Court would have been unable to outlaw school segregation[75] or to protect the right of privacy.[76] Are critics of judicial activism saying that the values of desegregation and privacy are unimportant? Or are they saying that the legislatures would have protected these rights adequately without Court action?[77] Neither of these assumptions seems plausible. The argument must be that the risk of errors is so great that it outweighs the benefits of discretion. This claim has not been proved or even argued for by opponents of judicial activism. They have been content to attach labels such as "undemocratic" and cry for "objectivity" and raise the ghost of Lochnerism. They have avoided any attempt at on-balance analysis of the relative benefits and costs of open-ended judicial review.

Furthermore, in evaluating the risk of judicial errors, it must be recognized that the danger is inherent to allowing judicial review. Ironically, the most frequently criticized decisions in U.S. history justified their conclusions with an explicit reliance on an originalist methodology. For example, the Court in *Dred Scott v.*

Sandford—widely regarded as one of the most tragic court decisions in U.S. history—explicitly premised its decision on an originalist methodology.[78] Lochnerism could be justified under originalism (the Framers' intent to limit government and protect contracts), conceptualism (the concept of freedom of contract), or the cultural values theories (natural law or the tradition against regulation). Simply put, the risk of errors is inherent to judicial review; errors are possible under any approach to constitutional interpretation.

Originalists must claim that the lessened degree of judicial discretion under their theory reduces the possibility of errors. This, however, is a conclusion that must be justified, not merely asserted. Originalists cannot argue that historically most errors would have been avoided with an originalist approach because the most frequently identified serious mistakes, especially the *Dred Scott* decision and Lochnerism, were originalist, at least in the justifications offered by the Court. Furthermore, many of the most highly respected decisions—rulings such as *Marbury v. Madison*, *Brown v. Board of Education*, *Baker v. Carr*—were openly nonoriginalist in their approach.

Nor is there any analytic reason to believe that originalism risks fewer errors just because it entails less discretion. Under originalism, the judiciary lacks discretion to escape outdated principles and policies. As explained earlier, an honest application of originalism would make the election of a woman as president or vice president unconstitutional because the Framers intended only for men to serve in those offices and the text of Article II refers to the chief executive as "he."[79] Moreover, discretion can be used for good or evil; the lessened degree of discretion under originalism reduces the possibility of good decisions. If originalists want to argue that their methodology risks fewer errors, they must explain why that is so, accounting for the bad decisions that result from blind obedience to the Framers' intent, and then demonstrate that the reduced errors outweigh the benefits that only nonoriginalism provides. To my knowledge, originalists have not begun to meet this burden. Ultimately, the question is whether the risks of judicial errors outweigh the benefits of having expansive judicial discretion.

In order to answer this inquiry it is necessary to consider how likely it is that there will be serious long-term errors. Several factors reduce the possibility of mistakes. I am not contending that these factors eliminate judicial discretion or provide determinacy in decision making. Rather, I am claiming only that these factors influence decision making and lessen the likelihood of errors.

First, there are sociological influences that decrease the chance that the Court will protect values that are not worthy of constitutional status. As members of society, the judges share common understandings and values. Although the meaning of language is indeterminate, there certainly are shared understandings. For example, no matter what the equal protection clause means, no one would think that it says anything about whether the United States should sell arms abroad. Similarly, the shared understandings of the equal protection clause make it unthinkable that the Court would read it as only permitting white Anglo-Saxon protestants to vote in national elections. The Sixth Amendment's right to a fair

trial would not be understood as saying anything about what medical services should be reimbursed under the Medicaid program.

Additionally, the judges are unlikely to select values foreign to society. The members of the judiciary are generally drawn from prominent social positions. If anything, they tend to be elites and therefore have upper-middle-class values.[80] The risk is that elitist judges, insensitive to the needs of most U.S. citizens, will rule in favor of the wealthy and powerful and against those most needing judicial assistance. Although this is a substantial danger, the courts still are likely to be superior to the legislature in protecting society's poorest and least powerful members. Legislatures are beholden to those with power, money, and influence. The judiciary rules on the claims of all, and its relative insulation often makes it more responsible than the politically accountable branches of government. This is not to deny that the judicial process is used by the rich and powerful to preserve their status and situation. It is to say that the least powerful in society nonetheless are better off with a judiciary where they have the possibility of being heard and receiving protection.

Although judges reflect society's values and are therefore unlikely to depart from them and cause major errors, that does not mean that judges always reflect the majority's values. To the contrary, it is desirable that the judiciary overrules current preferences in upholding fundamental rights. Nor do I contend that the shared meanings provide a substantial check on judicial discretion. Rather, my contention is merely that basic sociology decreases the chance that the Court will go off on a frolic and protect inappropriate values. Even the Lochner Court's protection of laissez-faire capitalism was understandable and widely supported at the end of the nineteenth century.[81]

Second, political limits also reduce the chance and effect of errors. For example, the interactions of the Court with the other branches of government lessen the need to fear judicial decision making. The Court must often depend on the other branches of government to enforce its decisions. As Alexander Hamilton noted in his famous *Federalist No. 78*: "The judiciary . . . may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[82] Thus, the Court must always be mindful of the fact that its decisions can be ignored. Choper offers examples of presidential nullification of judicial decisions.

> The presidential response may range from Abraham Lincoln's outright refusal to obey Chief Justice Taney's order in *Ex Parte Merryman* to Franklin Roosevelt's plan to openly defy the full bench if it ruled adversely in the *Gold Clause Cases* . . . to Andrew Jackson's alleged edict that he would leave John Marshall to enforce his own decision in the *Cherokee Indian Cases* to Dwight Eisenhower's seeming ambivalence following the *School Desegregation Cases*.[83]

The need to hand down decisions that will be obeyed serves as an outer boundary on judicial discretion. Moreover, if the Court's decisions were clearly erroneous and dangerous, they could be disregarded.

Again, the claim is not that such disregard is frequent. If it were, the Court could not perform its antimajoritarian function. Instead, I would argue that political influences lessen the chance of dangerous errors.

Furthermore, the possibility that the Court will be seriously out of touch with society is reduced by the appointment of new justices to the bench. Presidents obviously appoint Supreme Court justices with an eye toward how they will exercise discretion. The ability of a president to appoint, on the average, two justices means that the "policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States. Consequently, it would be most unrealistic to suppose that the Court would, for more than a few years, at most, stand against any alternative sought by a lawmaking majority."[84] The appointment power is not a majoritarian *control* of the judiciary; rather, it is just an influence that reduces the likelihood of Court invalidation of policies regarded by society as vital.

Third, the role of the judges helps to lessen the possibility of errors. A *role* is the set of norms that defines the proper behavior for each person in a particular position or situation. Social psychologists and organizational theorists have developed the concept of the role to account for how the definition of a person's tasks influences the way that person performs.[85] Experimental literature has consistently identified a positive relationship between role expectations and behavior.[86]

Above all, the Supreme Court's role is to uphold the Constitution of the United States. Therefore, errors that might be caused by external influences—lobbying, pressures, corruption—are substantially reduced. The fact that the Court is making a good-faith attempt to focus solely on what the Constitution should mean lessens the possibility of mistakes.

Moreover, part of the judiciary's role requires that it decide cases solely on the merits and that it issue written opinions justifying the result. The previous chapter discussed why the opinion-writing function is so important and why it helps to prevent errors and facilitates the correction of mistakes.[87] Robert Bennett explains that the "tradition of justification in the form of judicial opinion is a primary mechanism of constraint, exposing judicial decisions to the discipline of reason and judicial reasoning to the judgment of the world."[88]

Furthermore, adherence to stare decisis is an accepted part of the judicial role, and therefore courts attempt to come to decisions that are consistent with prior holdings, legitimately distinguishable from precedents, or that justify overruling conflicting cases. Although precedents are often disregarded and overruled in constitutional law, the general acceptance of stare decisis lessens the chance of mistakes because "precedents can and do have the effect of disciplining judicial reasoning."[89] It is not that precedents yield determinate results, just that they, too, influence decisions and reduce the risk of errors.

Fourth, the ability to amend the Constitution to overrule judicial decisions provides protection against Court tyranny. If a Court decision were truly out of touch with society, the Constitution could be amended. On four occasions, constitutional amendments have reversed Supreme Court decisions. The Eleventh

Amendment overturned *Chisholm v. Georgia*[90] and made states immune to suits in federal court. The Fourteenth Amendment overturned, in part, the Court's decision in *Dred Scott v. Sandford*[91] and said that slaves are persons and all persons are citizens of the United States. The Sixteenth Amendment overturned the holding in *Pollock v. Farmers' Loan & Trust Co.*,[92] permitting Congress to enact a personal income tax. Most recently, the Twenty-sixth Amendment overturned *Oregon v. Mitchell*[93] and gave 18- to 21-year-olds the right to vote in federal elections.

The claim, of course, is not that amendments provide a significant check on the judiciary. The difficult process required for amendment makes them quite unlikely. But they are possible and have been used when the Court's decisions have been widely viewed as erroneous. They, too, provide some protection against judicial mistakes.

I have repeatedly emphasized the limited point that I am trying to make in identifying these influences on the judicial process. Frequently, opponents of activist judicial review analyze these factors and point out that they do not eliminate judicial discretion or provide means by which the political branches oversee judicial action.[94] I agree completely with this and contend only that these factors influence choices; courts still possess tremendous discretion. Judicial discretion is essential, and inevitable, if the Court is to perform its task of adapting the Constitution to changing circumstances. Nonetheless, I contend that these influences combine to decrease the likelihood of serious, repeated judicial errors. Dworkin observes:

> [Although] we run a risk that judges may make wrong decisions . . . [w]e must not exaggerate the danger. Truly unpopular decisions will be eroded because public compliance will be grudging . . . and because old judges will retire or die and be replaced by new judges because they agree with a President who has been elected by the people.[95]

Of course, all these pressures can limit the Court's ability to do good as well as reduce the likelihood of harm. It is a difficult balance between wanting the Court to have sufficient discretion to produce good results in protecting minorities and individual liberties but not so much discretion to be without any check or limit. Ultimately, especially as argued in the next chapter, I believe that the constraints described above lessen the "down-side risk" of judicial review but that its potential remains high as an instrument for positive social change as reflected in the decisions of the last quarter century.

Phrased differently, I might be accused of undermining my earlier points by recognizing that there are limits on the Court's discretion. If there are these limits, how can it be known whether there is sufficient discretion remaining to permit the Court to achieve the underlying purposes of the Constitution? Although there is no way to definitively answer this question, it must be remembered that the limits exist only in the broadest sense as outer boundary constraints and within that boundary the judiciary still possesses great discretion to achieve all of the purposes described in earlier chapters. My point is that it is not a binary choice

between complete constraints and no limits. Although boundary limits only minimally constrain discretion, these should not be ignored in evaluating the likely risks of judicial decision making.

Thus, the conclusion is that the risks of errors with expansive judicial discretion are less than usually claimed. In part, this is because of the above analysis describing the factors that reduce the chance of error. In part, too, it is because the mistakes that do occur seem less dangerous than unchecked legislative or executive errors. One type of judicial error is a failure to uphold the Constitution and declare unconstitutional executive and legislative actions that should be invalidated. For example, many would criticize the Court's decision in *Korematsu v. United States*[96] because it did not declare unconstitutional the evacuation and internment of Japanese Americans during World War II.[97] Likewise, many criticize the judicial restraint of the Burger Court and its failure to declare unconstitutional injustices such as inequalities in the provision of public education.[98] However, this type of mistake does not justify eliminating judicial review because the Court's decision is adding minimal additional evil.[99] Certainly, there is some harm to judicial approval of deprivation of rights, but the government's actions themselves are the same as if there were no judicial review.

A second type of error occurs when the judiciary invalidates socially necessary legislation that it should sustain. This is the criticism of the Court's decision in *Dred Scott v. Sandford*,[100] where the Court declared unconstitutional the Missouri Compromise, and of the Lochner Court's invalidation of progressive legislation. In such instances, the judiciary effectively prevents the government from acting. Although the absence of needed government intervention can be seriously harmful, in general I believe that the absence of action is less risky than unrestrained action. That is, without judicial review, there would be little protection against tyranny by the majority or the disregard of constitutional provisions. The harms of such despotic rule are more to be feared than the overzealous judicial invalidation of legislation.

Having demonstrated that the risks of expansive discretion are less than usually thought, what remains is to show its benefits. I believe that the earlier chapters did exactly this. Previously, I established that only a constitution that evolves by interpretation can adequately protect minorities and safeguard fundamental rights. A judiciary insulated from the political process is uniquely suited to articulate society's deepest values and apply them to protect interests and groups most in need of assistance. The powerful in society can succeed in the legislature, but the powerless and unpopular need judicial protection. The Warren Court's legacy is a lesson of the benefits that can result from judicial discretion. No other institution but the Court would have desegregated the South. No other institution but the Court would have reapportioned state legislatures. No other institution but the Court would have had the courage to uphold the right to reproductive autonomy. Majority rule is a cornerstone of U.S. government, but there is a need to curb its excesses. Court review is the best means yet devised, and broad judicial discretion is essential if the Court is to fulfill its mission.

At the very least, this chapter demonstrated that it is misguided to search for a

model of judicial review that eliminates discretion. Further, expansive judicial discretion is desirable. There is no proof that originalism, which limits discretion, risks fewer errors or will produce better decisions. Additionally, expansive judicial discretion—inevitable under a Constitution that evolves by judicial interpretation—can provide benefits justifying the risk of errors that it entails.

7 Is Open-Ended Modernism a Desirable Method of Constitutional Interpretation?

Thus far, several conclusions have been established: that society should be governed by a constitution, that the meaning of the Constitution should evolve, that such evolution should occur by interpretation and not only by amendment, that the judiciary is the preferable interpreter, and that the process of interpretation is inherently open-ended and indeterminate. In other words, it is desirable for society to have an institution, such as the judiciary, that is accorded great discretion in imparting specific, modern content to constitutional provisions. The Supreme Court's role in interpreting the general language of the Constitution is to identify those values so important that they should be protected from majority rule. I term this approach to constitutional interpretation *open-ended modernism*.

I choose the label *open-ended modernism* advisedly. Two concepts are contained within it. One is that current concerns and conceptions should provide the specific meaning of the Constitution's open-textured clauses. The Constitution identifies enduring values—freedom of speech, privacy, equality. In applying them to contemporary problems and situations, the Court should not be limited to the understandings of men who lived one or two centuries ago. Hence, the model of review that I espouse must be termed *modernistic*. Modernistic does not imply that the Court is precluded from considering traditions or even the Framers' intent. Rather, it means that the Court is not bound by these considerations. In deciding whether the right to privacy protects private consensual homosexual activity, the result should not be dictated by the sexual mores of the Framers. As argued throughout this book, the proper method of constitutional decision making is one that allows evolution by interpretation, a process that inevitably is heavily influenced by modern conditions and values. The judicial role is to articulate the meaning of basic values in the contemporary context and to protect these values from unjustified infringement.

At the same time, I am not presenting a single normative or political theory to guide the Court in deciding cases before it. I studiously have avoided defending a particular moral or political theory. In part, this choice has been strategic. I hope to persuade people having many different beliefs of my argument about the judiciary and constitutional interpretation. Also, as I confessed in the Preface, I do not have a well-developed theory of justice to present. Thus, I see the appropriate model of constitutional decision making as open-ended in the sense that it is capable of being used to implement a variety of moral and political theories that will provide the specific content of the Constitution's provisions.

Although the term *open-ended modernism* seems heretical, this description of the judicial role should not be surprising because it is exactly the approach that has been followed throughout U.S. history. The Court has always interpreted the Constitution in an open-ended manner to meet the current society's needs. Throughout U.S. history, "the justices have employed their own beliefs and values as the foundation of constitutional rulings."[1] These values and beliefs are expressed in opinions that justify the results using acceptable forms of reasoning and argument. For example, during the pre–Civil War period, when there was a widespread belief in the existence of a natural law,[2] the judiciary's role was to discover this law and apply it to decide specific cases. The Court was implementing the ideology of the justices, although cloaking its decisions in the rhetoric of the natural law so as to give the "impression that, rather than creating law, it was discovering or revealing pre-existing law."[3]

For example, in *Calder v. Bull*, in 1790, the Court spoke of its ability to invalidate state and federal legislation if they violated "vital principles," even if those principles were not expressly stated in the Constitution.[4] Justice Samuel Chase stated:

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power. . . . An ACT of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . A law that punished a citizen for an innocent act; a law that makes a man a Judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a Legislature with such powers and, therefore, it cannot be presumed that they have done it.[5]

Similarly, in *Fletcher v. Peck*, in 1810, the Supreme Court invalidated a Georgia effort to revoke a land grant, concluding that the result could be justified "either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States."[6] The Court justified its conclusions by reference to "general principles which are common to free institutions," "natural law," and "certain great principles of justice whose authority is universally acknowledged."[7]

Toward the end of the pre–Civil War period, the Court invoked natural law principles in the infamous case of *Dred Scott v. Sandford* to explain why Congress

could not bar slavery from the territories and consequently why the Missouri Compromise was unconstitutional.[8] In ruling that slaves were the property of their owners and not citizens protected by the Constitution, the Court's interpretation of the Constitution helped precipitate the Civil War.[9]

As explained in the previous chapter, the natural law obviously has no determinate content. In these and other cases, the Court was engaging in an open-ended process to give specific natural law meanings to abstract constitutional provisions. Shaman explains that "[b]y resort to this artifice, the Court was able to constitutionalize the personal convictions held by the justices. Behind the facade of predetermination, the premodern Court constitutionalized personal values and beliefs held by the justices."[10]

Although after the Civil War belief in the existence of a natural law faded,[11] the Court continued to interpret the Constitution to protect then-modern values. During the period from 1887 until 1937—often referred to as the Lochner era—the Court invalidated literally hundreds of federal and state statutes based on its constitutional interpretations. For example, it interpreted the Tenth Amendment as reserving a zone of power exclusively for the states[12]—a view that previously had been rejected by the Court in Justice Marshall's famous opinion in *Gibbons v. Ogden*.[13] To protect this zone of state regulatory authority, from the late nineteenth century until 1937 the Supreme Court narrowly interpreted the commerce clause and invalidated numerous attempts by Congress to enact national regulations.[14]

For instance, the Court held that the term *commerce* only referred to the final stage of business and hence Congress could not use its commerce powers to regulate other aspects of business such as mining, manufacturing, or production.[15] The reach of the commerce clause was narrowed further by the Court's repeated holding that Congress could regulate only those aspects of business that had a "direct" effect on interstate commerce.[16] Moreover, the Court held that Congress could not use its power to prohibit commerce between the states as a means of controlling intrastate production.[17]

The Court was obligated neither by the language of the document nor the intent of its Framers to so drastically limit Congress's power under the commerce clause. In fact, there was compelling evidence that many of the Framers intended the commerce clause to grant Congress broad, plenary regulatory authority.[18] In *Gibbons v. Ogden*, in 1824, the Court had endorsed such an expansive view of Congress's authority. Justices, strongly opposed to government regulation and committed to laissez-faire capitalism, effectuated their beliefs by narrowly interpreting the commerce clause.

Also during this time period, the Court interpreted the "liberty" protected by the due process clause as safeguarding numerous values that were not explicitly protected in the Constitution's text. For example, in 1897, in *Allgeyer v. Louisiana*, the Court declared:

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is designed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free