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The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond

Daniel O. Conkle*

Today's conclusion by five Justices . . . is nothing other than a bald substitution of individual subjective moral values for those of the legislature.¹

Such a judicial substitution of moral values is precisely what Professor Michael J. Perry advocates in his recent book, The Constitution, the Courts, and Human Rights.² Relying not at all on the text or history of the Constitution, Perry formulates a functional justification for constitutional policy making in individual-rights cases, policy making by an unelected judiciary without reference to the intentions of those who framed the Constitution. He fashions the Supreme Court as a "moral prophet," beckoning the populace toward an ultimate realization of the morally correct answers to individual-rights questions, and he develops a theory of political accountability in an attempt to reconcile this broad judicial role with established democratic principles. Perry's is a forceful book, and his eloquent and lucid arguments no doubt will persuade many of the efficacy and propriety of his version of judicial review.³

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1. Solem v. Helm, 103 S. Ct. 3001, 3022 (1983) (Burger, C.J., dissenting); see infra note 222 and accompanying text.


3. Perry's work has been applauded as "the most powerful and compelling" recent effort to establish a functional justification for constitutional policy making by the judiciary. See Saphire, Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory (Book Review), 81 Mich. L. Rev. 782, 800 (1983).
I remain unpersuaded. In my view, Perry's model of judicial review not only fails to justify constitutional law making beyond the framers' intentions, but in fact would lead to a virtual elimination of the judicial role that Perry wishes to uphold and expand. I am convinced that Perry-style review would undermine, rather than support, the fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law; shorn of that legitimacy, the Court's constitutional decisions would face all-but-certain popular repudiation, and the Court's powerful voice would fall to a whisper.

Despite the ultimate failure of his overall theory, however, Perry's work contributes important new ideas to the ongoing debate concerning the legitimacy of judicial review. He published his thoughts "to help advance the conversation of constitutional theory," and in that venture his success cannot be questioned. In this Article, I join the conversation. Building upon the strengths of Perry's work and attempting to avoid its weaknesses, I present my own thoughts on judicial review, advancing an alternative theory to support the legitimacy of the Supreme Court's recognition of constitutional rights beyond those mandated by the framers.

Part I of this Article discusses the issue of legitimacy—the problem of reconciling judicial review with our society's basic commitment to majoritarian policy making. It outlines two
broad theoretical positions on the legitimate scope of judicial review: the "originalist" position, which contends that the Supreme Court must limit itself to values present in the original understanding of the Constitution; and the "nonoriginalist" position, which asserts that the Court is not so limited.

Part II summarizes and evaluates Perry's theory of non-originalist review. It explores Perry's contention that non-originalist review serves a crucial function in American society and describes and criticizes Perry's model of review, according to which the Supreme Court would decide issues based on the justices' personal moral values. It also examines, but rejects, Perry's method of reconciling his theory with the principle of majoritarian consent.

In Part III, I advance my own theory of judicial review. I contend that nonoriginalist review can indeed serve a critical function, but only if the Supreme Court draws its decisional norms from an external source that keeps faith with the Court's judicial office—a source I call the pattern of American moral development. I then attempt to reconcile my model with the principle of consent, and I examine why this model may well satisfy the American people's need for and perceptions about the Supreme Court's exercise of nonoriginalist review.

I. THE ISSUE OF LEGITIMACY

Our democracy rests on the fundamental proposition that governmental actions derive their legitimacy from the consent of the governed or, more specifically, from the consent of a majority of those governed. This basic principle formed the explicit basis for the Declaration of Independence, and its vitality

6. As I use the term, "legitimacy" implies something more than an institution's power to enforce its decisions. Rather, legitimacy implies authority: the institution ought to be obeyed because its decisions, in terms of their substance or at least the process by which they are formed, are right, proper, and morally justified. Cf. R. Bellah, The Broken Covenant: American Civil Religion in Time of Trial 142 (1975) ("It is the nature of a republic that its citizens must love it, not merely obey it."). See generally Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 807-08 (1983) (discussing empirical and normative aspects of legitimacy). I therefore disagree with those who proclaim that "power rather than law is supreme," see Miller, Toward a Definition of "The" Constitution, 8 U. Dayton L. Rev. 633, 650 (1983), or that "law is no more than the exercise of power," see Nowak, Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices, 17 Suffolk U.L. Rev. 549, 550 (1983).


8. The Declaration of Independence provides, in relevant part, that
remains undisturbed. Not surprisingly, most constitutional theorists, in one way or another, have accepted this principle as a given.9

When the Supreme Court10 exercises judicial review in the individual-rights context,11 however, its function is distinctly countermajoritarian. For the Court to recognize constitutional rights is for it to annul the challenged legislative or executive actions, actions taken, at least presumptively, with majoritarian consent.12 Moreover, not only is the Court counterrmanding

"[g]overnments are instituted among Men, deriving their just Powers from the Consent of the Governed." The Declaration of Independence para. 2 (U.S. 1776).


10. This Article focuses on the United States Supreme Court. Other federal and state courts, however, also make constitutional decisions, and much of the discussion would apply to those courts as well. See generally M. PERRY, supra note 2, at 4 & nn. 17-19 (discussing the preeminence of the Supreme Court in American jurisprudence and the special issues raised by state-court constitutional policy making).

11. The individual-rights questions giving rise to judicial review typically relate to the Bill of Rights or the fourteenth amendment. The exercise of judicial review outside the context of individual rights raises different issues. See generally id. at 37-60 (discussing federalism and the separation of governmental powers).

12. The Court's function is not countermajoritarian, at least not in the same sense, when it interprets statutes or formulates rules of common law. As traditionally understood, the Court in these circumstances acts to give effect to legislative intentions or to create law where the legislature has been silent. See J. ELY, supra note 7, at 4; Wellington, supra note 9, at 487. But cf. W. Popkin, The Collaborative Model of Statutory Interpretation 4 (1984) (urging a collaborative model of statutory interpretation, according to which "sovereignty does not reside in the legislature alone but in a process of dialogue between the courts and the legislature in which interpretive criteria are never completely dictated by the legislature") (unpublished manuscript on file with Professor Conkle) (footnotes omitted). In any event, the legislature can countermand the Court's statutory and common-law decisions by enacting statutes to clarify its intentions or to replace the Court's common-law rules. The principle of majoritarian consent remains intact. See generally J. ELY, supra note
preexisting majoritarian decisions, but the Court itself lacks a majoritarian mandate.13 Supreme Court justices, of course, are not elected, but rather serve lifetime appointments,14 and their decisions are not subject to any direct popular control. Accordingly, the question of legitimacy is readily apparent: by what right does the Court exercise this power of judicial review, a power that seems so dramatically inconsistent with the principle of majoritarian consent?15

A noncontroversial source of authority for judicial review is the Constitution, as understood by its framers.16 Thus, the Supreme Court acts with unquestionable legitimacy when it gives effect to individual rights specifically decreed by the Constitution, either through its unambiguous language or as that language was originally understood.17 In these instances, judi-

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7, at 4 (noting that in nonconstitutional contexts, courts merely stand in for the legislature and can be overruled by ordinary statutes). But cf. Wellington, supra note 9 (arguing that there is a close relationship between constitutional and nonconstitutional judicial decision making).

13. Cf. L. Tribe, AMERICAN CONSTITUTIONAL LAW 48 (1978) (stating that judicial review is "doubly suspect").


15. But cf. Chemerinsky, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, 62 TEX. L. REV. 1207 (1984) (arguing that the crucial question is not whether judicial review can be reconciled with the principle of majoritarian consent, but rather how much discretion the Supreme Court should have in determining the meaning of the Constitution).

16. The Constitution and its various amendments, of course, were adopted by different persons at different points in time. When I speak generally of "the Constitution," I include its amendments. Moreover, when I refer to "the framers" of the original constitutional text or of any amendment, I mean both the officials who voted to propose the enactment and those who voted to ratify it.

17. The issue is not quite as simple as I make it appear. It is one thing to say that the framers' intentions concerning individual rights should be given effect. It is something else to say that the Supreme Court, and not elected officials, should be the final arbiter of majoritarian compliance with those intentions.

Nonetheless, the legitimacy of this form of judicial review is not difficult to defend. The constitutional text itself provides support for the practice, although the language is hardly definitive. See U.S. CONST. art. III, § 2, cl. 1 (the judicial power extends to all cases "arising under this Constitution"); U.S. CONST. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); see also Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1, 2-5 (1959) (arguing that the text of the Constitution authorizes judicial review).

Moreover, the framers undoubtedly intended their judgments concerning
cial review can be seen either as consistent with the principle of consent\(^\text{18}\) or as independently legitimate in a system of constitutional government.\(^\text{19}\)

The Supreme Court's authority is properly questioned, however, when the Court recognizes constitutional rights not decreed by the framers, for in these cases the Court lacks its direct constitutional license to invalidate majoritarian actions.\(^\text{20}\)

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\(^\text{18}\) The Constitution, of course, was adopted with the consent of a majority. See Berger, *Michael Perry's Functional Justification for Judicial Activism*, 8 U. DAYTON L. REV. 465, 471 n.40 (1983); Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 386 (1983) ("That the American system of government traces its authority to a Constitution originally consented to by conventions elected by (a portion of) the people is one significant legitimating feature of the regime."); cf. Bork, supra note 9, at 3 ("Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.").

\(^\text{19}\) A constitutional government, by definition, operates pursuant to and in accordance with a constitution. It follows that as long as the constitutional government remains in place, so too should the principles embodied in its organic document. Cf. M. PERRY, supra note 2, at 12 ("No one, after all, contends that our commitment to the principle of electorally accountable policymaking is exclusive. We are committed as well to the principle that electorally accountable policymaking is constrained by the value judgments embodied in the constitutional text . . . ."); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383-84 (1981) ("The authoritative status of the written constitution is . . . an incontestable first principle for theorizing about American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is itself incapable of and not in need of further demonstration.") (emphasis in original).

\(^\text{20}\) Although the framers could have given the Supreme Court an open-ended license to "create" constitutional rights beyond those delimited at the time of the Constitution's adoption, there is no persuasive evidence that they did. As Professor, now Judge, Robert H. Bork has observed:

\[N\]ot even a scintilla of evidence supports the argument that the framers and the ratifiers of the various amendments intended the ju-
Thus, the critical issue becomes whether, or to what extent, the Court can legitimately recognize constitutional rights by reference to norms other than, or in addition to, those adopted by the framers. No issue of constitutional theory is more fundamental.21

In elaborating this issue, the conventional language of constitutional theory speaks of "originalist" (or its synonym, "interpretive") and "nonoriginalist" (or "noninterpretive") judicial review.22 "Originalist" review can be defined as constitutional decision making by reference exclusively to norms that the framers originally embodied in the Constitution.23 Being so defined, originalist review is not controversial.24 Conversely, when the Supreme Court decides constitutional cases by reference to norms other than or in addition to those supplied by the framers, its review can be labeled "nonoriginalist." Nonoriginalist review rests on no visible source of authority, and its exercise is controversial indeed. Thus, in the conventional lan-

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21. The analysis of any particular constitutional doctrine is incomplete without a prior resolution of the legitimacy issue, for one cannot fairly test the Supreme Court's selection of governing norms without first deciding the source or sources from which those norms can properly be drawn.

22. The "originalist"/"nonoriginalist" terminology was first suggested by Professor Paul Brest. See Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 204-05 (1980).

23. Professor Thomas C. Grey has written:
What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text—that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.

Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 706 n.9 (1975).

24. But see supra note 17.
guage of constitutional theory, the fundamental issue of legitimacy is whether, or to what extent, the Supreme Court can exercise nonoriginalist review.25

For the "originalist," the question of legitimacy has a simple answer, if not an easy one: all nonoriginalist review is illegitimate. The originalist finds the sole authority for judicial review in the framers' adoption of controlling norms, but that authority extends only to the invalidation of majoritarian actions that conflict with those norms. In other words, the Constitution, as originally understood, is authority for originalist

25. As I suggest parenthetically in the text, many scholars would substitute "interpretive" for "originalist" and "noninterpretive" for "nonoriginalist." See, e.g., J. ELY, supra note 7, at 1; Grey, supra note 23, at 705. "Originalist" and "nonoriginalist," however, are much more descriptive of the distinction they are employed to reflect. See Brest, supra note 22, at 204 n.1; cf. Bennett, Objectivity in Constitutional Law, 132 U. PA. L. REV. 445, 446 n.3 (1984) (arguing that "originalism" better captures the static pretense of the approach that seems to me to be its principal flaw").

Although "noninterpretive" review need not be as extreme as its name implies, the term might be taken to suggest the total absence of interpretation and thereby the absolute irrelevance of the constitutional text and the framers' intentions. Indeed, the term might even connote a failed attempt at interpretation. Thus, in the semantics of constitutional theory, any advocate of "noninterpretivism" starts with a self-imposed linguistic handicap: "noninterpretive" review sounds illegitimate. As Professor William W. Van Alstyne has stated:

It may say too much about the current condition of constitutional scholarship that "noninterpretivism" is willingly adopted as a mode of describing one's own work in constitutional law. If there were not writers who evidently welcome its fit [citing Perry as an example], one might have supposed that its use was limited and purely perjorative [sic], a mere epithet cast cruelly against a judge or another writer—a harsh opinion of their work (e.g., that judge so-and-so rendered another "noninterpretation" of the first amendment in his latest opinion).


Perry utilizes the "interpretive"/"noninterpretive" dichotomy in his book. See M. PERRY, supra note 2, at 10-11. In a new article emphasizing the importance (especially the symbolic importance) of the constitutional text, however, Perry employs the "originalist"/"nonoriginalist" terminology. See Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. CAL. L. REV. — (1985) (forthcoming). (Although Perry's new essay is part of a symposium, I had prepublication access only to his contribution; as a result, I have not considered the remainder of the symposium in the preparation of this Article.) See generally Schauer, An Essay on Constitutional Language, 29 UCLA L. REV. 797 (1982) (discussing the importance of the language in the constitutional text).
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review. But this grant of authority does not extend to non-originalist review.

The definition of originalist review thus is directly related to the basis of its legitimacy: the historical adoption of the Constitution and the embodiment in it of specified norms. Accordingly, originalist review permits only a historical analysis to determine precisely what constitutional rights the framers intended to create.\textsuperscript{26} The Court's mission is plagued with practical difficulties, for the framers' intentions are not easily divined.\textsuperscript{27} These practical difficulties, however, cannot justify a creative attempt to fill gaps in the framers' stated intentions. If those stated intentions are incomplete, equivocal, or ambiguous, the Court cannot recognize a constitutional right because its existence cannot be determined without reference to norms beyond those provided by the framers. When the Court cannot determine what the framers have said, it is as if they did not speak at all. The framers' guidance alone must be sufficient.\textsuperscript{28}

\begin{footnotesize}
\begin{enumerate}
\item The Court can glean the framers' intentions from the actual text of the Constitution, from the constitutional debates, from extrinsic circumstances surrounding the enactment, and even from the governmental structures that the Constitution ordains. As Professor Grey has observed:

The pure interpretive model should not be confused with literalism in constitutional interpretation, particularly with "narrow" or "crabbed" literalism. The interpretive model, at least in the hands of its sophisticated exponents, certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationships, as well as from explicit commands.

Grey, supra note 23, at 706 n.9 (emphasis in original).

\item Common problems include the determination of whose intentions are relevant; whether the intentions of some framers are more important than those of others; whether subjective, as well as objective, intentions can be examined; and whether statements made outside the formal process of constitutional enactment can be considered. See Saphire, Judicial Review in the Name of the Constitution, 8 U. DAYTON L. REV. 745, 772-78 (1983); cf. Brest, supra note 22, at 222 (suggesting that "the originalist constitutional historian may be questing after a chimera"); Dworkin, The Forum of Principle, 56 N.Y.U. L. REV. 469, 477 (1981) (noting that "there is no such thing as the intention of the Framers waiting to be discovered, even in principle"). For an intriguing discussion of originalism and the complex nature of historical knowledge, see Tushnet, supra note 6, at 793-804.

\item Professor Robert N. Clinton has argued that the judiciary has no choice but to assign meaning to unclear constitutional provisions that have been invoked in opposition to majoritarian actions:

[Just as judicial lawmaking is required when statutory provisions are ambiguous and the framers' intent is unclear, judicial lawmaking is required in the constitutional sphere when the Constitution is by its terms unclear and the intent of the framers is ambiguous. The necessity that the judiciary perform its intended obligation to interpret and

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In contrast to the very narrow role for the Supreme Court contemplated by originalism, "nonoriginalism" seeks to expand the Court's authority by defending the Court's use of norms beyond those constitutionalized by the framers. Nonoriginalists differ on the proper source of these norms, and the nonoriginalist position thus is not monolithic.29 Regardless of what source is identified, however, the nonoriginalist cannot attribute the Court's authority to the adoption of the Constitution,30 but must look elsewhere.

Although the line between originalist and nonoriginalist review is not a bright one, most of the Supreme Court's modern constitutional decisions31 must be characterized as nonoriginalist.32 In Brown v. Board of Education,33 for example, the Court found the majoritarian practice of segregated public schooling to be in violation of the fourteenth amendment. Segregated schooling, however, existed at the time of the fourteenth

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enforce the limits that the Constitution imposed upon the Congress and state legislatures imperatively requires it to make law in such cases if it is to discharge its functions.


There is another viable option, however, for a court presented with an ambiguous constitutional provision: simply reject the constitutional challenge. When faced with unclear legislative intentions in the course of interpreting a statute, it is true that a court ordinarily must give meaning to the statute as best it can, for the case must be decided one way or another. When faced with an unclear constitutional limitation on government, however, a court can decide the case without making dubious inferences concerning the framers' intentions, for it can instead defer to the majoritarian decision under attack. Cf. Bork, supra note 9, at 8 ("Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.").

29. Accordingly, the legitimacy debate is not necessarily an "all-or-nothing game." See infra Part III. But cf. M. PERRY, supra note 2, at 92 (arguing that "in crucial respects, it is an all-or-nothing game") (emphasis in original).

30. See supra note 20; infra note 63.


32. See M. PERRY, supra note 2, at 19; Brest, supra note 22, at 234; Kay, Preconstitutional Rules, 42 OHIO ST. L.J. 187, 189 n.10 (1981) ("Critics of all persuasions seem to agree that the Supreme Court has substantially departed from any reasonable interpretation of the drafters' intentions, at least in important areas of constitutional law."); Sandalow, Constitutional Interpretation, 79 MICH. L. REV. 1033, 1061 (1981) ("No more than a passing familiarity with history is required to appreciate that only a very small fraction of contemporary constitutional law corresponds with what can plausibly be considered the historical 'core meaning' of the Constitution, even on the most generous interpretation of that notion.").

amendment's adoption, and it continued thereafter unabated.\textsuperscript{34} Not surprisingly, the Court in \textit{Brown} conceded that the original understanding of the amendment was at best "inconclusive"\textsuperscript{35} but, relying on other normative considerations,\textsuperscript{36} it nonetheless recognized a constitutional right to be free from segregated schooling. Likewise, the framers' intentions compelled neither the Court's recognition of a constitutional right to abortion in \textit{Roe v. Wade},\textsuperscript{37} nor its recognition of numerous other modern constitutional rights.\textsuperscript{38}

Although originalism plainly does not describe the Supreme Court's actual role in contemporary American government, it is a comfortable theory. Finding no authority for nonoriginalist review, advocates of originalism rest their case, challenging others to prove them wrong.\textsuperscript{39} Moreover, playing

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\textsuperscript{34} As Professor Perry has observed, "[T]he legislative history of the fourteenth amendment clearly discloses that the framers did not mean for the amendment to have any effect on segregated public schooling or on segregation generally." M. Perry, supra note 2, at 66-67 (footnote omitted).
\textsuperscript{35} \textit{See Brown}, 347 U.S. at 489.
\textsuperscript{36} In its opinion, the Court emphasized the importance of public education and the psychological impact of segregated schooling. \textit{See id.} at 492-95. Following the \textit{Brown} decision, however, the Court soon made it clear that all public segregation was unconstitutional, undercutting the stated rationale in \textit{Brown} and suggesting that a broader moral principle was at work. \textit{See, e.g.}, Gayle v. Browder, 352 U.S. 903 (1956) (per curiam), \textit{affg mem.} 142 F. Supp. 707 (M.D. Ala. 1956) (segregated public buses unconstitutional); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam), \textit{modifying mem.} 223 F.2d 93 (5th Cir. 1955) (segregated public golf courses and parks unconstitutional); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam), \textit{affg mem.} 220 F.2d 386 (4th Cir. 1955) (segregated public beaches unconstitutional). In Johnson v. Virginia, 373 U.S. 61 (1963) (per curiam), the Court summarized the governing constitutional principle: "[A] State may not constitutionally require segregation of public facilities." \textit{Id.} at 62.
\textsuperscript{37} 410 U.S. 113 (1973). Professor, now Dean, John Hart Ely has called \textit{Roe} "the clearest example of noninterpretivist 'reasoning' on the part of the Court in four decades." \textit{See J. Ely, supra note 7}, at 2; \textit{see also} Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textit{Yale L.J.} 920 (1973); \textit{cf.} Strong, \textit{Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Processes,} 55 \textit{N.C.L. Rev.} 1, 97 (1976) (calling \textit{Roe} "a classic illustration of constitutional amendment by judicial say-so").
\textsuperscript{38} Professor Perry has concluded that "virtually all of [the] constitutional doctrine regarding human rights fashioned by the Supreme Court in this century" is based upon nonoriginalist review. \textit{See M. Perry, supra note 2, at 91; see also supra note 32 and accompanying text; cf.} Miller, \textit{supra} note 6, at 696 n.214 ("The Supreme Court has always been 'noninterpretivist'; those who dislike such activism are making 'should' or 'ought' statements.")
\textsuperscript{39} \textit{See, e.g.}, R. Berger, \textit{Government by Judiciary: The Transformation of the Fourteenth Amendment} 407 (1977) ("Whence does the Court derive authority to revise the Constitution? In a government of limited powers it needs always be asked: what is the source of the power claimed?").
\end{quote}
on the indisputable principle of majoritarian consent, the originalist message takes on populist overtones, supporting "the people" and decrying "judicial usurpation."\textsuperscript{40}

Originalism is such an enticing theory that numerous scholars seek to join the camp by expanding its boundaries. These theorists typically redefine originalist review by suggesting that the Court can look beyond the framers' particular intentions to their broader purposes and goals, thereby rendering many modern Supreme Court decisions "originalist" and hence legitimate.\textsuperscript{41} These definitional exercises are futile, for

Professor Grey has noted, originalism is a constitutional theory "of great power and compelling simplicity." See Grey, supra note 23, at 705.

40. Raoul Berger, for example, has asked:

Why should millions of Americans prefer the "gut" reactions of the Justices against death penalties, for instance, to their own belief that death penalties are a deterrent to crime, as current legislation in some 35 states attests? The judicial "gut" reaction, under democratic principles, is no substitute for the will of the people.

... [T]he real issue, judicial usurpation, [should be put] out into the open, so that the people can decide for themselves whether they prefer to rule their own destiny.

Berger, Incorporation of the Bill of Rights in the Fourteenth Amendment: A Nine-Lived Cat, 42 OHIO ST. L.J. 435, 466 (1981) (footnote omitted); see also Ervin, The Constitutional Power of Congress over Federal Courts, 68 A.B.A. J. 1536, 1536 (1982) ("I abhor judicial usurpation and deem tyranny on the bench as reprehensible as tyranny on the throne."); Marcus, Fight Looms on Court Jurisdiction, Nat'l L.J., Apr. 6, 1981, at 1, col. 3 (referring to "the euphemism called judicial review that has really become judicial tyranny" ) (quoting Representative Robert K. Dornan); cf. M. Perry, supra note 2, at 28 (noting that originalism "reflects a popular—'civics book'—understanding of the division of governmental authority in the American political system").

Of the Supreme Court's current membership, Justice William Rehnquist is perhaps the most vocal advocate of the originalist position. See Rehnquist, Observation: The Notion of a Living Constitution, 54 TEX. L. REV. 693 (1976). For other prominent statements of the originalist position, see R. Berger, supra note 39; Bork, supra note 9; Monaghan, supra note 19; Strong, supra note 37.

41. See, e.g., R. Dworkin, Taking Rights Seriously 132-37 (1977) (arguing that the focus should be on the framers' general "concepts," not their specific "conceptions"); J. Ely, supra note 7, at 12 (describing his theory as akin to a "broad form of interpretivism," one that seeks to derive norms "from the general themes of the entire constitutional document and not from some source entirely beyond its four corners"); Freund, Storms over the Supreme Court, 69 A.B.A. J. 1474, 1478 (1983) (claiming that the Supreme Court has not departed from "the connotative meaning, the purposive meaning" of the Constitution); Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 WAYNE L. REV. 1, 64 (1981) ("Interpretivism cannot be narrow in scope because this would defeat the framers' purpose of trying to govern the future through broad, general proscriptions; interpretivism cannot be narrow precisely because constitutional provisions are rarely narrow or specific in definition."); Leedes, A Critique of Illegitimate Noninterpretivism, 8
they disregard a critical point: the definitional scope of originalist review is limited by the source of its legitimacy. When the framers' intentions are exhausted, so too is the Court's authority.42 If the framers' intentions are not themselves sufficiently particular for the Court to define a constitutional right, that right cannot be defined without reference to other norms, norms to which an originalist Court cannot legitimately refer.

U. DAYTON L. REV. 533, 546 (1983) (stating that an originalist court can properly cite "the framers' first principles as opposed to the pragmatic eighteenth century applications of their first principles"); Lupu, Constitutional Theory and the Search for the Workable Premise, 8 U. DAYTON L. REV. 579, 603 (1983) (contending that originalist review includes not only a consideration of the framers' intentions concerning specific practices, but also an analysis of the "more generalized sense of the [constitutional provision's] aim"); Richards, The Aims of Constitutional Theory, 8 U. DAYTON L. REV. 723, 742 (1983) (asserting that the originalist focus can extend beyond the "denotation" to the "connotation or concept" of a constitutional provision); cf. Lynch, supra note 5, at 546 (arguing that the general language in the Constitution should be read in light of societal changes, regardless of whether "the framers of particular constitutional provisions consciously intended to leave particular questions of interpretation for future development by the courts"). Even Professor Bork, generally a classic originalist, defends first-amendment doctrine beyond that constitutionalized by the framers. Bork points to the Constitution's general recognition of democratic principles: "[The framers] indicated a value when they said that speech in some sense was special and when they wrote a Constitution providing for representative democracy, a form of government that is meaningless without open and vigorous debate about officials and their policies." Bork, supra note 9, at 26. See generally M. PERRY, supra note 2, at 65-66 (noting that Bork's position on the first amendment cannot be justified by reference to the framers' intentions).

Dean Terrance Sandalow's comment is apt: "Now it is true that all the decisions shaping constitutional law to contemporary values can also be understood as coming within the general intentions of the framers. All that is necessary is to state those intentions at a sufficiently high level of abstraction." Sandalow, supra note 32, at 1045. See generally Tushnet, supra note 6, at 790-92 (criticizing Dworkin's attempt to expand the originalist position through definitional enlargement).

42. As Berger has observed:
If . . . judicial review is in fact derived from the text and history of the Constitution, it must be within the compass envisaged by the Framers—policing of boundaries and exclusion of policymaking reserved to the legislature. History cannot be invoked to establish the power, then discarded when seen to limit its scope.
R. BERGER, supra note 39, at 362.

43. This does not mean that originalism prohibits the invalidation of modern analogues of practices that the framers intended to proscribe. Professor Perry, for example, asserts his belief that no theorist has ever argued that the judiciary should invalidate only political practices that were present to the minds of the framers and the framers meant to ban. The interpretivist concedes that the judiciary may, even should, strike down political practices that were not
Consider again the Court’s decision in *Brown v. Board of Education* and assume, for the sake of argument, that the historical record did not disclose the framers’ intention to permit the continuation of segregated schools, but instead was silent on that issue. Under the expanded originalist theory, the Court’s task in such a case would be to implement the “broad purpose” behind the fourteenth amendment. Even if the framers’ “broad purpose” was to promote racial equality, however, the Court could not apply that general principle to the particular question before it based on the guidance of the framers.

present to the minds of the framers and that, therefore, the framers could not have specifically intended to ban. But invalidation of such a political practice is legitimate, according to interpretivism, only if the practice is the analogue of a practice the framers did contemplate and mean to ban, different in no constitutionally significant respect from the practice the framers specifically intended to ban. After all, enforcing value judgments the framers constitutionalized certainly requires invalidation of practices different in no significant respect from those the framers banned. Thus, for example, the interpretivist need not oppose Supreme Court decisions subjecting wiretaps and electronic surveillance to the same fourth amendment standards as physical “searches and seizures.”

M. Perry, *supra* note 2, at 32-33 (footnotes omitted). Perry finds the identification of analogues to be “fairly straightforward”:

A present-day political practice, \( P' \), is simply an analogue of a past, constitutionally banned practice, \( P \), when a person—one who aspires to logical consistency and moral coherence—who would endorse the political-moral proposition that \( P \) ought to be banned, could point to no difference between \( P \) and \( P' \) that could count as a principled reason for failing to endorse the distinct proposition that \( P' \) ought to be banned.

*Id.* at 74.

Perry is correct in principle, for the framers undoubtedly intended to ban all practices “different in no constitutionally significant respect from the practice[s] the framers specifically intended to ban.” See *id.* at 32 (footnote omitted). He is also correct in practice to the extent that the identification of modern-day analogues can be logically derived from the framers’ intentions without regard to other normative factors. Thus, Perry’s “search and seizure” example, involving unforeseen technological advances, may be a good one. Given the basis of its legitimacy, however, originalism cannot defend the invalidation of any supposed “analogue” when its identification depends to any degree upon a norm or value judgment not provided by the framers. Cf. Tushnet, *supra* note 6, at 801 n.55 (arguing that the originalist “is unable to give a content to the idea of functional equivalence sufficiently determinate to enable us to know which contemporary practices are enough like past ones to fall under the framers’ ban”). See generally Lynch, *supra* note 5, at 547 (contending that originalism fails “to solve the problems posed by application of constitutional language to new technologies”).

44. See *supra* note 34 and accompanying text.

45. Cf. *supra* note 35 and accompanying text (despite strong historical evidence that the framers intended to permit the continuation of segregated schooling, the *Brown* Court labeled the evidence “inconclusive”).
Although the modern importance of public education, the psychological effects of segregated schools, and the moral implications of governmental decision making based on race might well have justified a conclusion that segregated schools hindered racial equality, none of these considerations are attributable to the framers. By definition, then, the Court's review in Brown could not have been originalist; it necessarily involved normative considerations beyond those embodied in the original understanding of the fourteenth amendment. Perhaps originalism is not as comfortable as it seems. One cannot be a principled originalist and defend the Supreme Court's decision in Brown. One cannot be a principled originalist and defend the Supreme Court's contemporary first-amendment doctrine. Indeed, a principled originalist would have difficulty supporting any of the constitutional rights recognized by the Court in its modern history, not because the rights should not exist, but rather because the Supreme Court should not be deciding these questions at all.

II. MICHAEL PERRY'S THEORY OF JUDICIAL REVIEW

Michael Perry is not comfortable with originalism. Recognizing the limited bounds of the originalist license, he rejects it as inadequate. In its stead, he proposes a different sort of license—a nonoriginalist license grounded upon the function that judicial review serves in American society. Perry's judicial li-

46. See supra note 36 and accompanying text.
47. As Professor Perry has noted:

Although we cannot say with certainty precisely what effect the framers of the Bill of Rights intended the first amendment to have with respect to freedom of expression, we can say that at most they intended it to prohibit any system of prior restraint and to modify the common law of seditious libel by making truth a defense and by permitting the case to be tried to a jury.

M. PERRY, supra note 2, at 63-64 (emphasis in original) (footnotes omitted). See generally L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) (describing the narrow interpretation accorded to freedom of expression during America's early history). Moreover, although first-amendment doctrine is now applied more frequently to state than to federal governmental practices, there is little evidence that the framers of the fourteenth amendment intended to extend to the states either the first amendment or any other provision of the Bill of Rights. See L. LEVY, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64 (1972).

48. See Grey, supra note 23, at 713 (observing that "an extraordinarily radical purge of established constitutional doctrine would be required if we candidly and consistently applied the pure interpretive model"); see also supra notes 31-38 and accompanying text.
cense would be remarkably broad, and its implications for the American system of government would be extreme.\(^4\)

A. PERRY'S FUNCTIONAL JUSTIFICATION OF NONORIGINALIST REVIEW

As a backdrop for his defense of nonoriginalist review in individual-rights cases,\(^5\) Perry sketches his understanding of the point at which originalism ends and nonoriginalism begins. Unlike many defenders of a broad judicial role,\(^5\) Perry properly eschews a definitional enlargement of the originalist position. Instead, he concedes that originalist review permits reference only to the framers' "plainly narrow"\(^3\) intentions.\(^3\) As a result, Perry cannot defend the Supreme Court's contemporary doctrine concerning individual rights as a product of originalist review.\(^4\)

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49. Perry's theory is descriptive as well as normative. In particular, Perry attempts to describe how the Supreme Court in fact exercises nonoriginalist review in individual-rights cases; in general, his normative theory attempts to justify and defend that process. See M. PERRY, supra note 2, at 91-145.

50. Perry also discusses the legitimacy of judicial review in cases involving federalism and separation-of-powers issues. See M. PERRY, supra note 2, at 37-60.

51. See supra note 41 and accompanying text.

52. M. PERRY, supra note 2, at 71 (emphasis omitted). Perry states that "power-limiting constitutional provisions—as opposed to power-granting ones—typically represent and embody . . . discrete, determinative value judgments about what particular sorts of political practices government ought to forswear." Id.

53. See id. at 10-11; see also id. at 28 (noting that the constitutional norms of originalism "consist solely of the value judgments constitutionalized by the framers").

54. As Perry explains:

It is doubtless true that our reading of the original understandings of constitutional provisions such as the free speech and free press clauses of the first amendment and the equal protection clause is not perfectly accurate. After all, it is impossible to uncover the intentions of each of the many framers of a provision—those who drafted the provision and then those in the state conventions or legislatures who ratified it. Moreover, historical inquiry is inevitably subjective: to some extent our vision of the past is irremediably colored—distorted—by our vision in the present. But if not perfectly accurate, our reading is sufficiently accurate—accurate enough to justify the conclusion that the Court's decisions regarding human rights in most modern constitutional cases of note, and particularly in most freedom of expression and equal protection cases, cannot plausibly be explained as "interpretations" or "applications" of any value judgments constitutionalized by the framers, whatever the precise character of those various value judgments might be. They can only be explained as products of noninterpretive review.

Id. at 69 (footnotes omitted); see id. at 19, 91.
But Perry wishes to defend the Court's doctrine, or at least much of it, and so he seeks to justify the process by which it is formulated, the process of nonoriginalist review. According to Perry, such a justification must, as a preliminary matter, permit compliance with the requirement of principled explanation, as articulated by Professor Herbert Wechsler. Wechsler contends that although courts have a duty to decide the constitutionality of value determinations made by the other branches of government, they must review those determinations as courts of law and not as "naked power organs." Consequently, courts cannot overturn majoritarian value judgments unless they base their decisions entirely on norms that "have force apart from the particular result they ordain in [any] case at hand—that is, norms that are both neutral and general."

A court's "principled explanation" of its constitutional decision, however, does not automatically make the decision a legitimate exercise of judicial review. As Perry notes:

While each and every exercise of judicial review must comply with the requirement [of principled explanation] in order to be legitimate, compliance is not sufficient for purposes of legitimacy. The question whether an explanation invokes only norms deemed by the court to have force apart from the particular result they ordain is distinct from the question whether the norm or norms invoked are the proper ones under all the circumstances. In particular, it is distinct from the

55. Although he concedes as "indisputably true" that the Supreme Court "is a fallible institution," see id. at 115, Perry believes that the modern Court, in general, has made sound decisions concerning individual rights, see id. at 117-18. Indeed, Perry asserts that the substantive merit of the Court's freedom-of-expression and equal-protection doctrines is beyond serious question. See id. at 117. Although he admits that the Court's substantive-due-process decisions are much more controversial, Perry generally defends them as well. See id. at 118.

56. See generally id. at 4-5 (discussing the relationship between "the legitimacy of a policymaking process" and "the soundness of . . . particular substantive constitutional doctrines generated by that process") (footnote omitted).

57. See Wechsler, supra note 17, at 19.

58. M. PERRY, supra note 2, at 26. Professor Wechsler elaborates: [The main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved. To be sure, the courts decide, or should decide, only the case they have before them. But must they not decide on grounds of adequate neutrality and general- ity, tested not only by the instant application but by others that the principles imply? Is it not the very essence of judicial method to insist upon attending to such other cases, preferably those involving an opposing interest, in evaluating any principle avowed? Wechsler, supra note 17, at 15; see also M. PERRY, supra note 2, at 25-27.
question of whether the source of norms from which the invoked norms are derived . . . is an appropriate one for constitutional adjudication.59

The legitimacy of judicial review therefore depends not only on a court's adherence to the requirement of principled explanation but also, and even more importantly, on the court's use of a source of "neutral and general" norms that is itself legitimate.

The ultimate test of legitimacy for a source of constitutional norms is whether the use of that source can be reconciled with the principle of majoritarian consent.60 Perry accepts the principle of consent as a given, although he refines it to a "principle of electorally accountable policymaking."61 "In our political culture," writes Perry, "the principle of electorally accountable policymaking is axiomatic; it is judicial review, not that principle, that requires justification."62 Perry thus assumes the task of attempting to justify the Supreme Court's exercise of nonoriginalist judicial review—its reliance on norms beyond those the framers embodied in the Constitution.

Finding no authority for nonoriginalist review in the text or original understanding of the Constitution,63 Perry concludes that the practice can be defended only through a functional jus-

59. M. PERRY, supra note 2, at 27 (footnotes omitted).
60. See supra text accompanying notes 6-21.
61. See M. PERRY, supra note 2, at 9. Perry derives his variation of the consent principle from our societal commitment to "democracy" in its procedural sense. See id. at 3-4. But "the word democracy is so freighted and misused, suggestive of vague substantive ideals as well as procedural forms," that Perry prefers the term "electorally accountable policymaking." See id. at 4. See generally id. at 9-10 (noting the fundamental support for "electorally accountable policymaking" in American culture).

Although the concepts of "majoritarian consent" and "electoral accountability" are closely related (and perhaps indistinguishable in most applications), I see no theoretical reason to limit the former to the latter.
62. Id. at 9 (footnotes omitted).
63. As Perry notes:

Bear in mind what it means to claim that the framers authorized noninterpretive review: the claim is necessarily that at some point (or points) in American history governmental officials delegated to the judiciary, in particular to the Supreme Court, authority to enforce against government, not particular value judgments the framers had deliberated and constitutionalized, but unspecified value judgments not constitutionalized or even always foreseen by the framers. That would have been a remarkable delegation for politicians to grant to an institution like the Supreme Court, given the electorate's long-standing commitment to policymaking—to decisions as to which values shall prevail, and as to how those values shall be implemented—by those accountable, unlike the Court, to the electorate. . . .

Id. at 20. Perry continues:
tification: "If noninterpretive review serves a crucial governmental function, perhaps even an indispensable one, that no other practice can realistically be expected to serve—and serves it in a manner that accommodates the principle of electorally accountable policymaking—that function constitutes the justification for the practice." Thus Perry maps his intended course: first, to identify a "crucial" function served by nonoriginalist review, and second, to reconcile such review with the principle of majoritarian consent.

In identifying the function of nonoriginalist review, Perry begins by contending that "the American people's understanding of themselves" imposes an American obligation to promote moral growth in the world by providing the right answers to questions concerning individual rights.

The American people still see themselves as a nation standing under transcendent judgment: They understand . . . that morality is not arbitrary, that justice cannot be reduced to the sum of the preferences of the collectivity. They persist in seeing themselves as a beacon to the world, . . . especially in regard to human rights ("with liberty and justice for all").

As Perry describes it, the American self-understanding necessarily presupposes the existence of right answers, answers that ought to prevail irrespective of the majority's will.

Although right answers exist, according to Perry, they have yet to be fully discovered and implemented. Hence, the

There is no plausible textual or historical justification for constitutional policymaking by the judiciary—no way to avoid the conclusion that noninterpretive review, whether of state or federal action, cannot be justified by reference either to the text or to the intentions of the framers of the Constitution. . . . Those who seek to defend noninterpretive review—"judicial activism"—do it a disservice when they resort to implausible textual or, more commonly, historical arguments; nothing is gained but much credibility is lost when the case for noninterpretive review is built upon such frail and vulnerable reeds.

Id. at 24-25; see also supra note 20. For the most prominent recent effort to tether a broad form of judicial review to the framers' intentions, see J. Ely, supra note 7, at 22-41. For reasons with which I generally agree, Perry rejects Ely's historical arguments. See M. Perry, supra note 2, at 21-24.

64. M. Perry, supra note 2, at 92-93.
65. Perry calls this understanding our "religious" self-understanding. He does not use the term "religion" in its theistic sense, but rather in the sense of a "civil" religion. See id.
66. Id. at 98 (emphasis in original) (footnote omitted). As Perry uses the term, "human rights" is synonymous with "individual rights." See id. at 61.
67. "According to this self-understanding, 'the will of the people is not [itself] the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong.'" Id. at 97 (quoting Bellah, Civil Religion in America, 96 Daedalus 1, 4 (1967)) (brackets indicate Bellah's language); cf. Rostow, The Democratic Character of
American self-understanding includes a commitment "to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding." Because of the moral fallibility of the people's will, this commitment to "moral evolution" requires something that majoritarianism alone cannot provide. It requires an independent institution to provide moral leadership by assessing the morality of majoritarian decisions. It requires, says Perry, a moral prophet.

To fulfill the role of moral prophet, an institution must be

Perry considers the possibility of right answers to be a necessary precondition for justifying nonoriginalist review, although he does not attempt a "metaethical" defense of his belief that right answers do exist. See M. Perry, supra note 2, at x, 102-07.

In a different vein, Perry uses the possibility of right answers as an alternative basis for his argument, an alternative he claims to be independent of his conception of our American self-understanding:

For the reader who suspects that in fact there is no religious aspect of American self-understanding—or that if there is, I have romanticized it beyond recognition—I can easily, and will readily, recast my essential claim . . .

Whether or not there is a religious aspect of American self-understanding, as a society we seem to be open to the possibility that there are right answers to political-moral problems. But even if evidence were slight that we are open to that possibility, we should be open to it . . . [This proposition] is altogether adequate for purposes of [describing the function of noninterpretive review]: Noninterpretive review enables us to keep faith with a possibility to which I think we are open, and to which in any event we should be open.

Id. at 102 (emphasis in original). Perry's recast argument appears to differ in but two regards from his primary one. First, America's self-understanding need not call for global leadership in the field of individual rights but rather may be limited to a search for right answers within our own geographical and political borders. Second, even if America has no self-understanding at all concerning right answers, whether for global or more limited purposes, it ought to have, and we therefore should seek out right answers regardless of any popular commitment to do so.

Perry's geographical point surely has no theoretical significance. His second point, however, adds a normative element ("we should be open" to the possibility of right answers) that tends to protect his argument from empirical attack. Thus, even if an empirical study somehow could demonstrate the absence of any American self-understanding of the type he posits, Perry's normative argument would remain: we should have a self-understanding of this type, and we therefore should act as if we do.

68. M. Perry, supra note 2, at 99; see also id. at 101 (claiming that Americans are "committed to struggle incessantly to see beyond, and then to live beyond, the imperfections of whatever happens at the moment to be the established moral conventions.").

69. Id. at 99.
70. See id. at 98.
relatively detached from majoritarian influences, allowing it to search out the higher goals of morality. As Perry notes, executive and legislative officials cannot perform this function.\textsuperscript{71} These majoritarian officials are primarily concerned with the desires of a majority of their constituents, the persons on whom the officials depend for their continued tenure in elective office.\textsuperscript{72} As a result, when these officials act on important political-moral issues,\textsuperscript{73} they "tend simply to rely on established moral conventions and to refuse to see in such issues occasions for moral reevaluation and possible moral growth."\textsuperscript{74}

As a matter of comparative institutional competence, states Perry, the Supreme Court is better suited to search for the right answers to political-moral problems.\textsuperscript{75} The Court has a significant measure of political independence, and its decisions are not subject to impulsive popular repudiation. Because of its political insulation, the Court, through the exercise of nonoriginalist judicial review, can regularly perform the essential role of moral prophet.\textsuperscript{76} Thus, nonoriginalist review "is an enterprise designed to enable the American polity to live out its commitment to an ever-deepening moral understanding and to political practices that harmonize with that understanding."\textsuperscript{77}

Accordingly, Perry concludes that the Supreme Court's exercise of nonoriginalist review serves the crucial function of discovering the right answers to individual-rights questions, thereby promoting moral growth.\textsuperscript{78} A conclusion that the Court can properly rely on norms beyond those constitutionalized by the framers, however, is incomplete. The source of norms that will prevail over majoritarian decisions must also be identified. To identify the source of governing norms is to particularize the process of nonoriginalist review, thereby permitting a meaningful analysis of its legitimacy.

Perry clearly identifies the source of norms to which he believes the Supreme Court does and should refer in the exercise

\textsuperscript{71} See id. at 100.
\textsuperscript{72} See id.
\textsuperscript{73} See id.
\textsuperscript{74} See id.; cf. G. WILL, STATECRAFT AS SOULCRAFT: WHAT GOVERNMENT DOES 159 (1983) (contending that "a government obsessed with responsiveness is incapable of leadership").
\textsuperscript{75} See M. PERRY, supra note 2, at 100-01, 102.
\textsuperscript{76} See id. at 101.
\textsuperscript{77} See generally supra text accompanying notes 63-64.
of nonoriginalist review. Advancing an admittedly "radical" theory, Perry asserts that the governing norms must come from an internal source—the justices themselves:

The problem of how to proceed, when dealing with a difficult human rights issue, is not different for the justice than it is for the legislator. As Cardozo wrote: "If you ask me how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." And the justice, like the legislator, will inevitably conclude that some particular political-moral principles (perhaps even a particular political-moral system) are better than others. Inevitably each justice will deal with human rights problems in terms of the particular political-moral criteria that are, in that justice's view, authoritative. I do not see how it could possibly be otherwise.

Thus, Perry concludes that "the ultimate source of decisional norms is the judge's own values (albeit, values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers)."

79. For Perry, the source of values to which the Court should refer is also the source to which, in his view, it does refer. See generally supra note 49.

80. M. PERRY, supra note 2, at 123.

81. Id. at 111 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921)). Justice Cardozo, of course, was not discussing the role of a judge in deciding constitutional challenges to legislative decisions that had already determined which competing interests should prevail. See B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113 (1921) ("[The judge] legislates only between gaps. He fills the open spaces in the law."); see also infra text accompanying notes 116-27.

82. See M. PERRY, supra note 2, at 123; see also id. at 111 n.* (suggesting that "judges do, and should, make a personal selection among competing values on the basis of individual conscience") (quoting Gibbons, Keynote Address, 56 N.Y.U. L. REV. 260, 274 (1981)).

Perry makes two significant subpoints concerning the quest for right answers. First, he suggests that although there may be no single authoritative moral system, right answers often reflect a philosophical and religious consensus, "a point at which a variety of philosophical and religious systems of moral thought and belief converge." See id. at 109 (emphasis in original); see also id. at 109-10. Second, he contends that when the American people eventually come to accept the Court's recognition of a constitutional right, this majoritarian acceptance tends to suggest that the Court's decision was morally correct. According to Perry, the Court's constitutional decision making creates a dialectical relationship between the Court and the majoritarian process; the majority may revise its original beliefs after being rebuffed by the Supreme Court and after reflecting on the values that the Court has upheld. See id. at 111-15.

Although a convergence of moral thought or an after-the-fact popular approval might suggest the right answers to moral questions, Perry's Supreme Court would not be guided by either of these possible criteria of decision. Rather than search for the point at which a variety of belief systems converge, the justices are to consult "what they personally regard to be the most rele-
In Perry’s view, the justices should not conceal this internalized process of nonoriginalist review from the American people. Rather, they should candidly admit to testing majoritarian actions against their own moral beliefs and should not pretend that the governing norms originate in some external source. Thus, although “no harm” would result from the justices stating that a governmental action “violates the Constitution,” they should make it clear that the value judgments are their own:

There is no excuse, so far as I can see, for trying to deny to the members of the American polity, and to their governmental representatives, the opportunity of deciding for themselves whether noninterpretive review is legitimate. If they are to make that decision, they must not be deceived as to the nature of the sort of judicial review the Court exercises.

Perry believes that the American people would accept his version of nonoriginalist review. In any event, he believes that they must have the ultimate power to accept or reject it and that their decision should be based on fact, not fiction.

In the final step of his analysis, Perry attempts to reconcile his conception of nonoriginalist review with the principle of

vant and fruitful moral thought.” Id. at 110-11 (emphasis added). Likewise, Perry does not expect the judiciary to predict what moral values might gain popular acceptance in the wake of judicial action. Rather, the Court is to seek out answers that are “morally correct independently of what a majority of the American people comes to believe in the future.” Id. at 115 (emphasis in original). Perry thus returns to his basic position: “[T]he determinative norms are the value judgments of the individual justices.” Id. at 119.

Professor Richard B. Saphire disagrees with this characterization of Perry’s theory:

[N]otwithstanding Perry’s assertion that the judge must derive the norms that are to be applied to evaluate government action from her own values (or her own moral vision), I do not read him to claim that the judge should rely upon her purely idiosyncratic moral conceptions. . . . At least where she can discern the difference between her own moral preferences and those emanating from the point at which extant systems of moral thought converge, she must decide according to the latter.

Saphire, supra note 3, at 793. Saphire himself questions the validity of his alternative interpretation of Perry. See id. at 793 n.48. From my reading of Perry, I cannot see how he could have been more forthright in rejecting the view attributed to him by Saphire. Perhaps Saphire’s effort to reconstitute Perry’s theory reflects an uneasiness with its implications. See infra Part II.B.1.
majoritarian consent. Perry rejects several means of political control, such as judicial appointments and constitutional amendments, as grossly inadequate to counteract the Supreme Court's enormous power of nonoriginalist review. In attempting to fashion a more realistic majoritarian control on the Court's power, Perry asserts that Congress must be permitted plenary power under the article III exceptions clause to limit Supreme Court and other federal court jurisdiction to decide nonoriginalist issues of constitutional law. Thus, under Perry's theory, Congress could reverse the effect of any decision not based on originalist review by abolishing federal-court jurisdiction in cases raising that type of constitutional challenge. Congress, for example, could effectively overrule Roe v. Wade by "denying to the lower federal courts and to the Supreme Court jurisdiction over any case in which a state law restricting access to abortion is challenged on constitutional grounds." Perry is "not happy conceding such a broad jurisdiction-limiting power to Congress," but he sees it as the essential link to the principle of majoritarian consent, a link

88. Perry finds the process of judicial appointment to be an ineffectual control both because of the slow turnover of Supreme Court justices and the difficulty of predicting how any individual will perform as a justice. See id. at 127; see also J. Ely, supra note 7, at 47. Moreover, he asserts that the process of constitutional amendment, although potentially effective in overturning unpopular constitutional decisions, is not a majoritarian control at all because it calls for "supermajorities" in support of both proposal and ratification. See M. Perry, supra note 2, at 127. Perry also rejects the efficacy of congressional budgetary and impeachment powers. See id. at 128.

89. U.S. Const. art. III, § 2, cl. 2 ("[T]he Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."). To be precise, the exceptions clause relates only to the jurisdiction of the Supreme Court. Congressional power over the jurisdiction of the lower federal courts, however, is no less extensive than its power over the Supreme Court's appellate jurisdiction, whatever that power might be. See U.S. Const. art. III, § 1 (Congress has the power, but not the duty, to create lower federal courts).

90. See M. Perry, supra note 2, at 128-39.

91. Perry would not permit the congressional power over jurisdiction to be used "as a means of preventing the federal judiciary from enforcing value judgments constitutionalized by the framers." See id. at 130. But cf. infra note 247.

92. Perry maintains that the power to eliminate jurisdiction is theoretically distinct from a power to enact direct legislative reversals of particular Supreme Court decisions. See id. at 135-37. He seems to concede, however, that the distinction is tenuous. See id. at 137; see also infra note 150.


94. M. Perry, supra note 2, at 145.

95. See id. at 137.
without which nonoriginalist review becomes indefensible.96

B. A CRITIQUE OF PERRY'S THEORY

Perry's argument in support of the legitimacy of nonoriginalist judicial review can be reduced to three basic propositions. First, nonoriginalist review serves a crucial function by furthering a search for answers that are morally right, not just politically popular. Second, in fulfilling this function, the individual justices of the Supreme Court should decide constitutional cases by reference to their own moral values. Third, this process of nonoriginalist review is not inconsistent with the principle of majoritarian consent because Congress can control such review by controlling the Court's jurisdiction. It is primarily with Perry's second and third propositions that I take issue.

1. Justices' Personal Values as Controlling

Perry concedes that his theory is "radical" in declaring that "the ultimate source of decisional norms is the judge's own values."97 Perry's position not only is radical, but is fundamentally at odds with the two conditions that he himself sets forth as essential for establishing a legitimate theory of judicial review. In particular, Perry's theory of nonoriginalist review fails to identify a source of norms that is itself legitimate, and the theory also is inconsistent with the requirement of "principled explanation."98

The legitimacy of any source of norms can be evaluated at different levels. At one level, the source of norms can be tested directly against the basic principle of majoritarian consent. If the majority, in one way or another, has consented to the Supreme Court's use of a set of norms for constitutional adjudication, then that set of norms is legitimate. The use of norms provided by the framers, for example, can be defended in this manner.99 Under this analysis, the legitimacy of a source of norms itself determines the legitimacy of the form of judicial review that invokes those norms; when the source of norms is "legitimate" in this sense, the process of review necessarily is consistent with the principle of majoritarian consent. If the

96. See id. at 137-38. But cf. infra note 244 (discussing a new Perry essay suggesting that the jurisdiction-limiting power is not essential).
97. See M. PERRY, supra note 2, at 123.
98. See supra text accompanying notes 55-59.
99. See supra note 18.
majority has consented to constitutional decision making by reference to certain norms, it has consented to that type of judicial review and the overriding question of legitimacy has been answered.

Perry, however, does not and could not contend that his version of nonoriginalist review is legitimate simply by virtue of the source of norms that he identifies as controlling. Constitutional decision making by reference to the justices' individual moral values, standing alone, obviously could not command majoritarian support. Absent other majoritarian controls, no significant portion of the American populace would knowingly support or acquiesce in having majoritarian decisions invalidated when they conflict with the particular moral beliefs, however thoughtfully derived, of a majority of nine unelected judges. Indeed, it would be difficult to imagine a less democratic governmental process.\(^{100}\)

Perry's theory of judicial review thus cannot depend on majoritarian consent to the source of norms that he identifies as controlling.\(^{101}\) Even if a source of norms is not legitimate in the ultimate sense of having majoritarian support, however, it

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100. See Lupu, supra note 41, at 599 (“Perry's version of the Court's role is . . . maximally vulnerable to the charge of elitism of the worst sort.”).

Although some observers share Perry's belief that the justices impose their personal values in the name of the Constitution, these persons are the Supreme Court's harshest critics. Columnist William F. Buckley, for example, calls the Court's exercise of judicial review “the constitutional objectification of the Supreme Court's desires and velleities”:

It works as follows: We, the Supreme Court, believe in one-man one-vote, therefore the Constitution does. We, the Supreme Court, believe that prayer ought not be conducted in the public schools, therefore the Constitution does. For men who are sworn to uphold the Constitution to vote without any references to their own evaluation of the historical meaning of the Constitution is nothing less than an abandonment of duty.

This phenomenon (the Constitution is whatever the Supreme Court says it is) transcends the question whether you favor or do not [the particular rights that the Court has recognized]. Buckley, Court Aborting Constitution, Herald-Telephone (Bloomington, Ind.), July 7, 1983, at 10, col. 3; see also Ervin, supra note 40, at 1536 (“[A]ctivist Supreme Court justices [should] stop substituting their personal notions for constitutional precepts, while pretending to interpret the Constitution.”).

If the Supreme Court in fact were guided only by the moral beliefs of its members, Buckley's critical views undoubtedly would hold sway. At least in the absence of other majoritarian controls, there can be no genuine doubt that the American populace has not and would not consent to having “five Justices . . . [substitute their] individual subjective moral values for those of the legislature.” Solem v. Helm, 103 S. Ct. 3001, 3022 (1983) (Burger, C.J., dissenting); see infra note 222 and accompanying text.

101. As a result, Perry must otherwise reconcile his theory with the princi-
nonetheless can be logically and functionally appropriate within an overall theory of review. In other words, the legitimacy of a source of norms can be considered without direct reference to the principle of majoritarian consent, but rather by evaluating the source of norms itself and the implications of that source for the constitutional theory of which it is a part. In testing Perry's theory, this level of analysis asks whether the justices' use of their personal moral values as controlling norms is consistent with Perry's functional justification for nonoriginalist review.

According to Perry, nonoriginalist review serves a crucial function by propelling the American polity toward an ultimate realization of the morally right answers to questions concerning individual rights. Although the Supreme Court may not always provide the correct answer when it first considers an issue, it is expected generally "to move us in the direction of a right answer." Indeed, the search for right answers could not be furthered unless nonoriginalist review tended to eventually provide answers that were morally correct. Consequently, Perry's theory cannot succeed unless there is some reason to believe that most of the Supreme Court's answers will be morally sound. More specifically, there must be some reason to believe that the source of constitutional norms posited by Perry—the justices' individual moral values—is likely to provide moral truth.

Perry grounds the Supreme Court's role as an agent of moral prophecy entirely on a claim of "comparative institutional competence." According to Perry, executive and legislative officials cannot be expected to reach the right answers to moral questions because they feel compelled to reach answers

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1. See M. Perry, supra note 2, at 115; cf. id. at 111-15 (contending that the Court's constitutional decision making gives rise to a dialectical relationship between the Court and the majoritarian process).

2. Id. at 102.

3. Perry believes that the modern Supreme Court's constitutional doctrine concerning individual rights is generally sound. See id. at 117-18; supra note 55. Even if Perry is right, however, this conclusion, standing alone, does not support his functional justification for judicial review. For Perry's justification to succeed, the moral soundness of the Court's decisions must be more than coincidence; it must depend on, or at least be consistent with, the process of decision making that Perry describes.

4. See M. Perry, supra note 2, at 102; supra notes 71-76 and accompanying text.
that are politically acceptable. The fact that the majoritarian branches are not likely to reach morally correct answers, however, does not mean that the Supreme Court is likely to do so. The Court’s political insulation merely removes one constraint on uninhibited moral analysis, the constraint of direct political accountability. Although the absence of that constraint may be necessary for an institution to reach thoughtful moral decisions, it is hardly sufficient to justify a claim that the institution’s decisions “therefore” will be morally correct.

Perry utterly fails to explain why his Supreme Court, relying on the personal moral values of its members, would be likely to provide answers that are morally correct. Under Perry’s constitutional model, the Supreme Court would act not as a court but as a special sort of legislative body. Thus, says Perry, quoting Justice Benjamin N. Cardozo, each justice would gain “‘knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.’” Given their political insulation, the justices would not be constrained—as are ordinary legislators—to follow the majority’s will. Instead, they would be free to enforce their own will, their own political-moral beliefs. Political-moral beliefs, however, depend on numerous psychological and sociological factors deriving from such things as a person’s parental background, religion, education, occupational history, social relationships, and indeed, all of a person’s life experiences. Perry’s theory necessarily implies a claim that morally correct answers would emerge from decisions reflecting the individual beliefs of five or more Supreme Court justices, decisions that inevitably would depend on the particular personal characteristics that each justice had brought to the Court. Such a claim surely

106. See M. Perry, supra note 2, at 102.


108. M. Perry, supra note 2, at 111 (quoting B. Cardozo, supra note 81, at 113).

109. Cf. B. Cardozo, supra note 81, at 12 (“All their lives, forces which [judges] do not recognize and cannot name, have been tugging at them—inhertit instincts, traditional beliefs, acquired convictions . . . .”).

110. Perry suggests that “there are practical limits to what a judge should say is constitutionally required or forbidden, his own values notwithstanding.” See M. Perry, supra note 2, at 123 (emphasis in original). He notes that “if there is an occasional member of the federal judiciary whose moral views are,
cannot be supported. Accordingly, the source of norms identified by Perry—the justices' personal moral values—is inconsistent with his functional justification for nonoriginalist review because there is no reason to believe that such review would serve the purpose that Perry suggests. Even in this limited sense, therefore, the posited source of norms is not legitimate.

Perry's theory thus fails the first essential prerequisite for establishing a valid theory of judicial review, that the theory identify a legitimate source of norms. For similar but distinct reasons, his theory also fails the second. In particular, his proposal that the justices use their individual moral beliefs as a source of governing norms is inconsistent with the need for principled explanation.

As Perry recognizes, the basic requirement of principled explanation demands that all decisions be grounded on norms that "have force apart from the particular result they ordain in the case at hand—that is, norms that are both neutral and general." If the requirement entailed no more than this, Perry's theory would permit judicial compliance; Supreme Court justices could draw general moral principles from their individual value schemes and apply those principles with a "neutrality transcend[ing] any immediate result."

The requirement of principled explanation, however, has broader implications. It derives from the more fundamental proposition that courts adjudicating constitutional cases must render judicial decisions, not legislative ones. Thus, writes Pro-
fessor Wechsler, courts "are bound to function otherwise than as a naked power organ; they participate as courts of law." Just as the judicial function demands the use of norms that are neutral and general, so too does it require a source of norms that is external, a source of norms other than the internal, personal beliefs of the individual justices.

In *The Nature of the Judicial Process*, Justice Cardozo identified the requirement of principled explanation nearly forty years before Professor Wechsler's oft-cited article. "One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness." Cardozo, however, went beyond this basic conclusion that judicial rulings must be neutral and general. Although, as Perry suggests, Cardozo recognized similarities between the judicial and legislative models, he also noted critical differences:

While the legislator is not hampered by any limitations in the appreciation of a general situation, which he regulates in a manner altogether abstract, the judge, who decides in view of particular cases, and with reference to problems absolutely concrete, ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

Cardozo thus suggests that the use of an external source of decisional norms serves to negate personal biases, thereby tending to ensure neutral-and-general judicial decisions.

More important than this insurance against arbitrary decision making, however, the very nature of the judicial institution compels the use of an external source of norms. Judges, after all, are judges. They are lawyers, trained in legal reasoning—reasoning perhaps from statute, perhaps from precedent, perhaps from custom or tradition, but always reasoning from something. By reasoning from an external source of norms, a judge renders decisions that can be tested and criticized at each

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115. Wechsler, supra note 17, at 19.
116. See supra note 81.
117. Cardozo's book was published in 1921, see supra note 81; Wechsler's article in 1959, see supra note 17. Cardozo's book, of course, was devoted primarily to common-law decision making. See supra note 81.
118. B. CARDOZO, supra note 81, at 112.
119. See M. PERRY, supra note 2, at 111; supra text accompanying note 81.
120. B. CARDOZO, supra note 81, at 120-21.
In particular, critics can intelligently question and challenge whether any given source in fact provides the norm that the judge finds controlling. Were judges to derive norms from within themselves, however, only the judges' personal values could be criticized. Their legal analysis would be unassailable; no one could contend that the judges' personal values did not include whatever norms they might invoke.122

The objectivity of legal reasoning separates the judge from the legislator. This detachment from personal sentiment commands unqualified respect and defines the judicial office. As Justice Cardozo stated, "the task of the judge [is] the task of a translator, the reading of signs and symbols given from without."123

Under Perry's model of internal judicial decision mak-

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121. Professor Mark V. Tushnet has argued that the requirement of principled explanation does not provide any meaningful constraint on judicial decision making, in that the "consistent" development and application of constitutional doctrine can be readily manipulated through differing definitions of the governing "neutral principles." See Tushnet, supra note 6, at 810-21; cf. Tushnet, The Dilemmas of Liberal Constitutionalism, 42 Ohio St. L.J. 411, 424 (1981) (stating that he, Tushnet, would decide constitutional cases by making "explicitly political" judgments favoring socialism and then would write opinions "in some currently favored version of Grand Theory"). I believe that Tushnet grossly underestimates the intellectual integrity of judges and the ability of legal scholars to evaluate constitutional decision making.

Of course it is true, as Tushnet suggests, that any constitutional doctrine can be criticized or defended for logical consistency and that the proper resolution of such arguments will depend upon which aspects of which precedents should be found controlling. Some arguments, however, are better than others. Compare, for example, Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 Stan. L. Rev. 1113 (1980) (arguing that the abortion funding cases were wrongly decided in light of existing Supreme Court precedent) with Tushnet, supra note 6, at 811-14 (disputing Perry's argument). Far from negating the importance of the requirement of principled explanation, the susceptibility of judicial decisions to analytical criticism and defense itself forms a vital part of that requirement. See generally infra notes 147 & 183.

122. Cf. J. ELY, supra note 7, at 44 (noting that a theory that judges should impose their personal values in constitutional cases "is not a theory of adjudication at all, in that it does not tell us which values should be imposed") (emphasis in original); O'Fallon, Skepticism and Politics in the Domain of Rights, 8 U. Dayton L. Rev. 713, 718 (1983) (explaining that under Perry's theory, "[t]he practice of giving reasons is not to be jettisoned, though the sense in which they are reasons—can be understood to function as reasons—would seem to have been fatally compromised") (emphasis in original).

123. B. CARDOZO, supra note 81, at 174. Professor Owen M. Fiss has written:

[Judges'] capacity to make a special contribution to our social life derives not from any personal traits or knowledge, but from the definition of the office in which they find themselves and through which
ing, however, American jurisprudence would risk "degenerating into . . . a jurisprudence of mere sentiment or feeling. A judicial judgment . . . 'should be a judgment of objective right, and no subjective and free opinion; a verdict and not a mere personal fiat.'"\textsuperscript{124}

To be sure, judges cannot completely detach their judicial selves from their personal beliefs and desires. "We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."\textsuperscript{125} Objectivity, however, is and must be the judicial goal. Although personal beliefs will color their vision, judges must search for rules of law beyond themselves.\textsuperscript{126} They are judges. They are not "knight[s]-errant roaming at will in pursuit of [their own ideals] of beauty or of goodness."\textsuperscript{127}

they exercise power. That office is structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective—not to express his preferences or personal beliefs, or those of the citizenry, as to what is right or just, but constantly to strive for the true meaning of the constitutional value.

\textbf{Fiss, Foreward: The Forms of Justice, 93 HARV. L. REV. 1, 12-13 (1979) (footnote omitted). See generally Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739 (1982) (disputing the view that constitutional interpretation cannot be objective).}

\textsuperscript{124}. See B. CARDOZO, supra note 81, at 106-07 (footnotes omitted).

\textsuperscript{125}. \textit{Id.} at 13. In an elaboration of his position, Justice Cardozo stated:

The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is.

\textit{Id.} at 176.

\textsuperscript{126}. As Judge Learned Hand has written:

No doubt it is inevitable, however circumscribed his duty may be, that the personal proclivities of an interpreter will to some extent interject themselves into the meaning he imputes to a text, but in very much the greater part of a judge's duties he is charged with freeing himself as far as he can from all personal preferences, and that becomes difficult in proportion as these are strong.

\textbf{L. HAND, THE BILL OF RIGHTS 71 (1958).}

\textsuperscript{127}. B. CARDOZO, supra note 81, at 141. For an important and useful essay distinguishing judicial objectivity from constitutional authoritativeness, see Bennett, \textit{supra} note 25.

Perry's thinking concerning the nature of nonoriginalist judicial review appears to be undergoing something of a transformation. In a new essay, he links nonoriginalist review to the American political tradition and its aspirations and, if I read him correctly, he may be retreating from the proposition that Supreme Court justices should use their personal values in an open-ended search for moral truth. \textbf{See Perry, supra note 25.}
2. Reliance on Exceptions Clause

The ultimate validity of any theory of judicial review depends on reconciling such review with the principle of majoritarian consent. Perry does not contend that his version of nonoriginalist review satisfies the consent principle by virtue of the source of norms that he identifies as controlling, the personal moral values of the justices. Likewise, he does not suggest that the posited function of nonoriginalist review—furthering a search for morally correct answers—is sufficient to justify the practice, because Perry's functional justification has no direct relation to the requirement of consent; even a functionally useful governmental practice should not prevail in a democratic society unless it receives majoritarian support.

Thus, nothing inherent in Perry's functional model of nonoriginalist review reconciles such review with the principle of consent. Indeed, Perry's model exacerbates the problem. All judicial review, even originalist review, presumptively conflicts with the requirement of consent, for the Supreme Court's recognition of any constitutional right substitutes the decision of an unelected court for that of elected officials. The conflict is much more pronounced, however, when the Court exercises nonoriginalist review. Nonoriginalist review cannot be defended by reference to the actions of the elected officials who adopted the Constitution; at the same time, it expands the Court's judicial role by enlarging the source of norms that can be used to invalidate majoritarian decisions. The broader the scope of judicial review, the greater the countermajoritarian dangers.

Perry's model of judicial review would grant to the Supreme Court a virtually unlimited power to articulate constitutional rights, deciding for itself the boundaries of its authority. Confined only by their collective good judgment, the justices would be free not only to move beyond the realm of originalist review, but to engage in an open-ended search for moral truth by looking within themselves for answers that are

128. See supra note 100 and accompanying text.

129. One could read Perry's functional argument simply as providing reasons why the majority ought to accept nonoriginalist review, if and when it is given a chance. Cf. M. PERRY, supra note 2, at 140 n. (*"I think noninterpretive review is legitimate and would be accepted by the polity as such . . . ."*).

130. See supra notes 20 & 63; see also supra note 18 and accompanying text (originalist review can be defended in this manner, thereby tending to mitigate its countermajoritarian nature).
morally right. Perry apparently recognizes that his model poses extraordinary countermajoritarian dangers, tilting the scales heavily against the majoritarian process:

The tension between noninterpretive review and the principle of electorally accountable policymaking seems especially acute in light of the fact that the decisional norms the Court elaborates and enforces in the exercise of such review are derived not from some authoritative source of value, external to the Court, to which "the people" subscribe, but from the justices' own values.

Given the expansive judicial model that Perry creates, he can satisfy the consent requirement only by creating an equally expansive majoritarian counterbalance. Perry, in a sense, has painted himself into a corner.

Having drawn such an awesome power of nonoriginalist review, Perry understandably rejects as inadequate a number of traditional majoritarian controls on the Supreme Court and its decisions. Instead, he attempts to reconcile his model with the principle of majoritarian consent by relying on article III's exceptions clause. In particular, Perry would concede to Congress a plenary power to limit—or even eliminate—the Supreme Court's jurisdiction to decide nonoriginalist constitutional issues. Thus, by a simple majority vote in each House coupled with presidential approval, Congress could adopt jurisdiction-limiting legislation, thereby effectively overruling nonoriginalist decisions by depriving the Court of jurisdiction "to decide future, similar cases in the same way."

Perry contends that congressional resort to the exceptions clause would not "'demoralize and upset the judicial process.'" He notes that Congress has "not relied on a jurisdiction-limiting proposal in over a hundred years as a way of dealing with an unpopular Supreme Court decision."

131. Cf. Rabkin, supra note 5, at 145 (describing Perry's model as "breathtakingly open-ended").
132. M. Perry, supra note 2, at 125.
133. See supra note 88 and accompanying text. But cf. infra note 244.
134. See supra note 89.
135. See supra note 91.
136. M. Perry, supra note 2, at 131 (emphasis omitted).
137. See id. at 132 (quoting McCleskey, Judicial Review in a Democracy: A Dissenting Opinion, 3 Hous. L. Rev. 354, 364 (1966)).
138. See id. at 133. This failure to enact jurisdiction-limiting legislation has occurred despite the introduction and consideration of numerous legislative proposals. For partial listings of recent proposals, see Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741, 744 n.4 (1984); Rossum, Congress, The Constitution, and the Appellate Jurisdiction of the Supreme Court:
gressional doubts—unfounded doubts, if Perry is correct—concerning the lawful scope of the exceptions clause may partially explain this congressional inaction. According to Perry, however, "[a] deeper reason for Congress's reticence about jurisdiction-limiting proposals ... has been the fact that many members of Congress approve of the Court's policymaking with respect to human rights, even those aspects of its policymaking that have borne the brunt of widespread criticism, though their approval is often strategically covert." Consequently, suggests Perry, members of Congress may be ignoring their constituents' wishes by using the Supreme Court as a scapegoat. "One can begin to understand why many members of Congress may have a vested interest in turning a deaf ear to jurisdiction-limiting proposals, even to the extent of acting as if there are serious doubts as to the extent of its jurisdiction-limiting power." Perry therefore does not fear the exceptions clause because he does not believe Congress is likely to use it.

Perry's reliance on a theory of covert congressional support for the Supreme Court's decisions, however, ignores a much more likely explanation for Congress's failure to adopt jurisdiction-limiting legislation. Even if members of Congress perceive that the exceptions clause gives them the power to overturn Supreme Court decisions, they may nonetheless believe that it would be improper to exercise that power, whether or not they disagree with any particular decision. Most members of Congress, like their constituents, believe that the Supreme Court has a special role in deciding constitutional cases, such that the Court's decisions concerning individual rights ought not to be disturbed by the majoritarian process. They respect the Supreme Court as a court of law, a court that they perceive to make principled constitutional decisions through traditional legal reasoning and analysis. To be sure, most members of

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139. See M. PERRY, supra note 2, at 134.
140. Id.; cf. 104 CONG. REC. 3198 (1958) (statement of Sen. Talmadge) (claiming that some in Congress, "for political considerations, choose to wink at the Court's flagrant usurpations").
141. M. PERRY, supra note 2, at 134 (emphasis in original).
142. See id. at 132.
Congress must recognize that the Court engages in nonoriginalist review by referring to norms beyond those supplied by the framers. The Court can engage in such review without losing congressional respect, however, as long as the norms to which it refers derive from sources perceived as appropriate for constitutional decision making.

Perry’s judicial model, however, differs markedly from the traditional one that Congress and the American public have come to accept. Under Perry’s theory, the Court would not act as a court of law, testing majoritarian decisions against an external source of norms, but rather would substitute the justices’ personal “right answers” for the “wrong answers” reached by a majority. If the Court has ever engaged in that sort of constitutional decision making, it has never revealed it to Congress and the American people. If Perry’s theory were to prevail, however, the justices would be required to “disclose” what Perry feels they should be doing and in fact have been doing all along—recognizing constitutional rights based on their own notions of morality. Moreover, if Perry is correct, there is no mental psychological need in the American people for moral certitude, a need the Supreme Court fills through its constitutional rulings).

144. See infra text accompanying notes 185-243.
145. See infra Part III.
146. See generally M. Perry, supra note 2, at 139-41. But cf. supra note 100 (some critics of the Supreme Court believe that the Court simply substitutes its will for that of the majority).
147. See M. Perry, supra note 2, at 139-40. As Perry observes, there is no excuse for an attempt by the Supreme Court to conceal the manner in which it exercises judicial review. See id. at 140; supra text accompanying notes 83-87. Professor Saphire, however, takes issue with Perry on the question of judicial candor:

[Even if I were to accept Perry’s conclusion that the Court has been engaged in pure policymaking, I would still be cautious in suggesting that it should (at least precipitously) be candid in announcing [that fact]. Although there is much to recommend candor . . . it is not necessarily the exclusive, nor always the most important, political or moral value.

Saphire, supra note 3, at 797 n.65 (citation omitted). If Saphire is suggesting that the Court should be permitted to deceive the people “for their own good,” his suggestion is remarkably elitist. If he is suggesting something else, he needs to amplify his position.

Note that judicial candor does not necessarily require that a court’s written opinion, containing the legal justification for its decision, include an explanation of the extralegal factors that may have influenced its result. See N. MacCormick, Legal Reasoning and Legal Theory 16 (1978) (“[W]hat prompts a judge to think of one side rather than the other as a winner is quite a different matter from the question whether there are on consideration good justifying reasons in favour of that rather than the other side.”); cf. Leedes, supra note 41, at 543 (“What the judge had for breakfast may prompt him to
impediment to the congressional adoption of jurisdiction-limiting legislation to countermand nonoriginalist Supreme Court decisions, and Congress and the public ought to recognize the existence of this power. If, in such an environment, the Supreme Court, with unblushing candor, were to attempt to replace the majority's answer to a moral question with the justices' own, Congress doubtless would countermand the Court's decision. Even if one were to attribute past congressional inaction to covert congressional support for the Court's unpopular decisions, that support would quickly disappear in the light of constituent knowledge that the justices were overriding majoritarian values with their own and that Congress had the unquestionable power to overturn the Court's actions.\textsuperscript{148}

It simply is impossible to believe that Perry's constitutional model would operate in the manner that he would hope. Perry would demean the Supreme Court's function in constitutional cases by eliminating the Court's role as a court of law and substituting a role of unelected moral legislature. As a result, the Court could create whatever "constitutional" rights it desired, but the Court's decisions would warrant little public respect. Perry's solution to the problem of majoritarian consent, the congressional power over jurisdiction, would unquestionably be effective, so effective that it would destroy the Court's power to render unpopular nonoriginalist decisions.\textsuperscript{149} Perry-style judi-

\textsuperscript{148}. Cf. Rabkin, supra note 5, at 147 ("Writing well after the 1980 elections, [Perry shows no] great concern about the possibility of a destructive popular backlash against the excesses of judicial activism.").

\textsuperscript{149}. Professor James M. O'Fallon has discussed the effect of Perry's position concerning the congressional power over jurisdiction:

The important thing to note about submission of jurisdiction to legislative control is what it does to the sense of "right" involved in innominate rights review. No longer could rights be thought of as something we have independent of majority will. There might be collateral consequences, depending on the way control over jurisdiction was exercised, which would stand in the way of making the jurisdictional question a straightforward referendum on the right. But the
cial review, coupled with the legislative oversight that he con-
templates, would relegate constitutional doctrine to no greater
stature than statutory interpretation or common-law decision
making—indeed, less, for the Court's recognition of constitu-
tional rights necessarily would run counter to preexisting
majoritarian policies.150

Perry favors an expansive role for the Supreme Court, a
"fierce" judicial activism.151 Ironically, the implications of his
theory point unmistakably to an evisceration of the Court's im-
portant function in American government. In attempting to
fan the fire of morality, Perry would unintentionally douse the
flame.

fact is that it would leave us only those rights that no determined ma-

O'Fallon, supra note 122, at 720.

150. In refusing to concede to Congress an outright power to reverse the
Court's nonoriginalist decisions (as theoretically distinct from a power to elim-
nate the Court's jurisdiction), Perry suggests how such a power of reversal
would adversely affect the Supreme Court's governmental role:

Were Congress to be conceded the power to reverse, we would come
to view the Court, in its noninterpretive role, as a sort of delegate of
Congress, much as a court in its common-law role is a delegate of the
legislature, which may revise the common law. Such a change in the
relationship between Congress and the Court would tend to under-
mine the very inter-institutional tension—the dialectical interplay be-
tween Court and Congress—that is the reason to value noninterpretive review in the first place. The moral authority of the
Court's voice would be diminished; its opinions would be essentially
only advisory.

M. Perry, supra note 2, at 135-36.

Why would legislative control over jurisdiction not have the same effect?
Perry's answer is not persuasive: "[T]here is a difference between reversing
the Court on a particular issue, and merely silencing the Court. The power to
silence (the jurisdiction-limiting power) has never been thought to reduce the
Court to Congress's delegate." Id. at 136 (emphasis in original). And why not?
If, for example, Congress were to eliminate the Supreme Court's jurisdiction
(and that of the lower federal courts) to hear any case challenging the constitu-
tionality of a state law restricting access to abortion, such a jurisdictional
statute would have virtually the same effect as a legislative determination that
Roe v. Wade and its progeny had been wrongly decided. See id. at 130-31.

151. See id. at 138.
Although I reject Perry's expansive model of nonoriginalist review, I do not reject all of his thoughtful insights on the possible function of such review. To reject nonoriginalism would be to reject wholesale the Supreme Court's contemporary constitutional doctrine concerning individual rights. It would mean that judicial review could serve no function beyond that permitted by originalism, that is, beyond the testing of majoritarian actions against the particular intentions of a group of historical actors—the constitutional framers. As Perry teaches, however, our society vitally needs to search for the right answers to questions concerning individual rights. Indeed, as our majoritarian government grows, the need to protect individual rights becomes ever more essential. The Supreme Court has the necessary political independence to redress majoritarian decisions that undermine individual rights and if, through the practice of nonoriginalist review, the Supreme Court somehow can identify rights that morality requires us to recognize, the practice should not be lightly cast aside.

To advocate nonoriginalist review is to propose the use of constitutional norms beyond those provided by the framers. It is not to suggest, however, that all possible sources of norms are acceptable, nor that the proper scope of nonoriginalist review is boundless. Nonoriginalist review is not monolithic, and neither is the issue of its legitimacy. To the extent that the permissible nonoriginalist sources or the permissible occasions for their use are limited, the exercise of nonoriginalist review itself is constrained. Through the identification of such constraints, one may be able to isolate a species of nonoriginalist review much more defensible than the one suggested by Perry.

In the remainder of this Article, I attempt to isolate and defend such a species of judicial review, one that goes well beyond originalism but that falls far short of the broad judicial role that Perry describes. In so doing, I identify the source of nonoriginalist norms to which I believe the Court can properly refer, and I outline the criteria that the Court should consider in deciding when to use that source in the exercise of nonoriginalist review. Unlike Perry's expansive model of judicial

152. See supra text accompanying notes 31-48.
153. See supra text accompanying notes 22-28.
154. See supra note 29 and accompanying text.
review, the model suggested here is one that I believe the American people and their elected representatives have come to accept as useful and appropriate. Accordingly, this model, unlike Perry's, can operate in relative harmony with the principle of majoritarian consent without inviting Congress to determine, on a case-by-case basis, whether the Court's constitutional decisions should be legislatively countermanded under the exceptions clause.

A. THE SUPREME COURT AS A COURT OF LAW: THE ROLE OF THE JUDICIARY IN DEFINING CONSTITUTIONAL RIGHTS

In determining the proper scope of judicial review, two basic propositions must be recognized at the outset. First, as Perry suggests, there is a critical need to achieve better answers to individual-rights questions than the answers provided by the majoritarian process alone; judicial review should address this need to the fullest extent possible. Second, the Supreme Court is not and cannot be a "bevy of Platonic Guardians." It is rather a court of law, a court composed of judges with a special, but limited, role. To disregard the second proposition is to undercut the first, for the American polity understandably would reject any effort by the Court to make moral judgments outside the Court's appropriate judicial function.

The requirement that the scope of review be shaped by the Court's judicial function suggests certain limitations. As discussed earlier, the Court's decisional norms must originate in a source external to the Court and its members. In addition, the Court's use of such an external source must be circumscribed by the justices' competence—their ability to determine what norms the source contains and to articulate rules of law consistent with those norms.

Both of these limitations flow from the nature and special strength of the judicial process. Unlike legislative actions, judicial decisions are not grounded directly on popular consent. Instead, they owe their stature to the process by which they are rendered, a process not based on log-rolling or political compromise but rather on reasoned discourse. In rendering its decisions, a court responds to legal arguments and makes legal arguments of its own. It invokes rules of law—legal norms—from sources outside the judge's personal beliefs, sources that

155. L. HAND, supra note 126, at 73.
156. See supra text accompanying notes 113-27.
can be independently analyzed by legal critics. This process of legal reasoning tends to ensure not only a "principled explanation" for the court's decision but also an overriding judicial objectivity, neutrality, and fairness. Moreover, even in the use of an external source of norms, a court must act within the limits of its competence. Otherwise, its decisions would warrant no respect, being supported neither by direct popular consent nor by any expectation of a sound result.

These limits on the judicial function might suggest to some that the Supreme Court is institutionally incapable of addressing America's need to pursue moral truth. Clearly, the Court cannot, as Perry maintains, directly search for answers that are "morally right" in an absolute sense—answers that transcend the multifarious systems of political, moral, and religious thought and that resolve moral controversies for which those various systems provide divergent solutions. There simply is no recognized external source from which the Court, through a process of legal reasoning, could derive answers of this type.157

Nonetheless, I contend that judicial review, in a less direct way, can forestall moral retardation and promote moral growth. In particular, I believe that judicial review, consistent with the limited nature of the judicial office, can operate to keep America on its own path of moral development, as evidenced by our history and traditions, our contemporary national values, and the emerging trends of American morality. This suggested source of constitutional norms, an external source to which the Supreme Court can properly refer, tends to

157. Although he opts instead for an internal source of decisional norms, Perry does suggest an external source that might tend to reflect "morally right" answers. In particular, he suggests that the correctness of a given answer may be evidenced, "in part at least, by its location at a point of convergence among a variety of moral systems." See M. Perry, supra note 2, at 110; see also supra note 82. If this "point of convergence" represents a point at which the moral systems of most Americans converge, then Perry's observation may have merit, although I would prefer to think of the point as a point on the evolving pattern of American morality that I discuss in the text. If, on the other hand, Perry is referring to moral systems not commonly accepted in America, then the Supreme Court would appear to lack the competence to derive norms from such a source of decision or even to determine which moral systems ought to be canvassed in searching for a point of convergence. See infra text accompanying notes 181-83. But cf. Richards, Moral Philosophy and the Search for Fundamental Values in Constitutional Law, 42 OHIO ST. L.J. 319, 324-30 (1981) (arguing that judges can benefit from moral philosophy even when conflicting moral theories support divergent substantive results). In any event, the American people would surely reject the Court's reliance on moral systems not prevalent among Americans. See generally infra Part III.B.
reflect what the American nation has regarded and is coming to regard as morally sound. For the Court to test majoritarian decisions against norms derived from this source is for it to further moral growth, but only in the sense of keeping the American polity on its own developing course of moral thought. As such, judicial review cannot directly seek out “morally right” answers, but it can attempt to keep America “on track” and perhaps even propel it forward toward its ultimate moral destination.158

Given the countermajoritarian nature of nonoriginalist review, however, it must serve a critical function in order to warrant a theoretical defense. Thus, one might question the validity of a theory that calls for the Supreme Court merely to enforce some recognized pattern of American moral development and not to search directly for moral truth. But recall Perry’s discussion of moral evolution.159 Perry contends that the American polity is, and always has been, engaged in a process of moral growth, a process reflecting an ever-deepening understanding of moral issues and their proper resolution. Perry’s principle of moral evolution thus would suggest that our moral conventions are, and always have been, in a process of gradual change, change for the better, change moving us ever closer to answers that are morally right (in the absolute sense). If so, then there may be a pattern of American moral development that would itself suggest answers morally superior to those of any temporary majority.

At least as to individual rights, the evidence appears to confirm that America is on a course of moral evolution, a course of moral growth. In our treatment of black Americans, for example, we have moved from the institution of slavery to a rather broad recognition that racial discrimination should not be tolerated. In a similar fashion, we are coming to regard most forms of sex discrimination as impermissible, this in a society where women were long denied even the right to vote. Likewise, we

158. Professor Alexander M. Bickel noted:
The function of the Justices . . . is to immerse themselves in the tradition of our society and of kindred societies that have gone before, in history and in the sediment of history which is law, and, as Judge Hand once suggested, in the thought and the vision of the philosophers and the poets. The Justices will then be fit to extract “fundamental presuppositions” from their deepest selves, but in fact from the evolving morality of our tradition.

A. BICKEL, supra note 9, at 236 (quoting Sweezy v. New Hampshire, 354 U.S. 294, 267 (1957) (Frankfurter, J., concurring)).

159. See supra text accompanying notes 68-70.
have begun to recognize greater rights for the handicapped, the institutionalized, and the poor. Few would contend that we have not at least been making "progress" concerning individual rights, that is, morally positive changes for the better.\textsuperscript{160} Regardless of whether we can ever reach the level of ultimate moral truth, or even know precisely what it is, our society appears to be moving (perhaps very slowly) toward such a destination.

America, however, does not always push forward on its general course of positive moral development. "Significant accomplishments in building a just society have alternated with corruption and despair in America, as in other lands, because the struggle to institutionalize humane values is endless on this earth."\textsuperscript{161} Although the nation's long-term pattern may reveal a course of moral growth, temporary majorities representing temporary opinions can cause the country to deviate from this course or can slow progress to a halt.\textsuperscript{162} Accordingly, the long-term pattern of American moral development is likely to suggest answers that are morally superior to those of any transient majority.

This pattern of American moral development thus represents an external source of nonoriginalist norms to which the Supreme Court can and should refer when deciding questions concerning individual rights. Through the use of this source, the Court can advance the country's moral development by rejecting the inconsistent actions of temporary majorities. In this fashion, the Supreme Court can further, albeit indirectly, the search for morally right answers.

When deciding an individual-rights issue, of course, the Supreme Court cannot rely on the pattern of American moral

\textsuperscript{160}. As Professor Robert N. Bellah has noted:

[S]imultaneous with widespread evidence of corruption has been continuous pressure for higher standards of moral behavior. Eighteenth-century Americans with a few notable exceptions tolerated slavery; we do not. Nineteenth-century Americans tolerated violence and discrimination against immigrants and ethnic minorities; we do not. The early 20th century tolerated the notion that women were basically inferior to men, even while giving them the right to vote; we do not. In the treatment of blacks, ethnic minorities, and women we still have far to go, but it would be hard to argue that we were better in these respects at any earlier period in our history.

R. BELLAH, \textit{supra} note 6, at xi-xii.

\textsuperscript{161}. \textit{Id.} at 2.

\textsuperscript{162}. As Professor Wellington has observed, "[C]ommunities, like individuals, may well violate principles to which they usually adhere." Wellington, \textit{supra} note 9, at 514 n.133.
development unless it can identify the pattern with respect to that issue. To locate this pattern, the Court can examine factors such as constitutional and statutory enactments (and failures to enact), societal customs and practices, and public opinion. When evidence of this type reveals a dominant American position on the issue at any given point in time, that position represents a point on the pattern of American moral development. Through the mapping of such points, the pattern itself can be derived.

The more developed the pattern of American morality, the greater the confidence with which the Court can act. The Court therefore is least likely to err when the moral principle it upholds has already grown to reflect the contemporary national morality. In such an exercise of nonoriginalist review, the Court draws its decisional norms from this contemporary morality and invalidates as unconstitutional any inconsistent governmental practice.

163. As to certain moral issues, such as racial discrimination, the basic pattern now seems unmistakable. As to others, it may be incomplete and uncertain.

164. Even if a pattern of morality can be identified, it is of little use in determining the course of moral evolution unless it is a pattern of development, i.e., changing morality. If the pattern is flat and unchanging, it might reflect moral stagnation or perhaps even moral truth, but it cannot reflect moral growth. The principle of moral evolution tells us only that a historical pattern of changing moral beliefs is likely to reflect positive moral growth.

Note that the pattern of American moral development, in a sense, is majoritarian in character. It has been established by the American people and their elected representatives. And yet it transcends the ordinary majoritarian process by tracing the American morality, a majoritarian morality, as it has developed and is developing over the course of our national history.


Professor Ira C. Lupu has written that the search for unenumerated constitutional values should be "for values deeply embedded in the society, values treasured by both past and present, values behind which the society and its legal system have unmistakably thrown their weight." See Lupu, Untangling the Strands of the Fourteenth Amendment, 77 MICH. L. REV. 981, 1040 (1979) (emphasis omitted). Lupu argues that there must be a historical as well as a
Majoritarian governmental practices, of course, ordinarily reflect the contemporary American morality, but this is not invariably so. For example, a state or federal practice may suffer from legislative inattention and thus fall behind the advancing moral pattern. Alternatively, in any given state, even a policy that has received recent majoritarian reaffirmation might nonetheless conflict with what has become the American morality, for the American morality is national in its geographic scope; one state's moral development might lag behind.

Many Supreme Court decisions protecting procedural rights, including the rights of the criminally accused, can be understood as exercises of nonoriginalist review upholding contemporary values in the face of legislative inattention. Legislatures concentrate primarily on substantive rights and obligations, not the method by which those rights and obligations are to be enforced. Indeed, procedural challenges frequently attack administrative practices, such as police practices, that have been created and maintained without any direct legislative involvement at all. Moreover, even if the legislature, at one time or another, has turned its attention to a procedural issue, it is unlikely to monitor its resolution of that issue for continued adherence to contemporary values. Most procedural matters are perceived to be "technical" in character and not of significant public-policy concern. As a result, legislators generally do not attend to the protection of procedural rights, at least not on a regular basis. It therefore should not be surprising that judicial review has played a dominant role in shaping such rights, rights that the majoritarian process itself might have recognized had it seen fit to consider the matters at stake.

Nor is the problem of legislative inattention limited to the realm of procedure. Legislatures often neglect to repeal sub-

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166. What I say of legislative officials applies as well to elected executive officials at any level of government.

stantive statutes that no longer reflect society's changing morality. The judicial invalidation of these statutes likewise can be explained as an application of contemporary moral values.168

If the legislature recently has turned its attention to a question of individual rights, however, one could argue that the legislature's resolution of that issue necessarily determines the contemporary American morality. If so, then no exercise of nonoriginalist review with respect to that issue could be understood as being based merely upon the enforcement of contemporary moral values. To the contrary, however, I believe that many nonoriginalist decisions—in particular, decisions in which the Court has invalidated state (as opposed to federal) practices—can indeed be so understood, even though the legislature may have recently addressed the issue in question.

When the United States Congress has reached a recent conclusion concerning an issue of individual rights, its decision

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168. Constitutional decision making in institutional reform cases, for example, can be readily explained in this fashion. See M. Perry, supra note 2, at 152 (observing that the intolerable conditions in "many prisons and mental health facilities are not part of some institutional master plan, ratified by a legislature," but rather "are in significant measure the consequence of legislative and bureaucratic inertia and, of course, of budgetary priorities") (footnotes omitted); see also Sandalow, Judicial Protection of Minorities, 75 Mich. L. Rev. 1162, 1187 (1977) (noting that many constitutional challenges are directed to administrative practices, not legislative policies). As Professor Perry wrote in an early article:

Mindful that legislatures by and large reflect conventional attitudes, it might seem at first blush that morals legislation will always serve the public morals, that the legislature will make criminal only nonobtrusive human behavior which the moral culture believes should be criminal. This, however, is not always the case. A law may remain on the books for so long that it no longer reflects contemporary moral culture. The anti-contraception statute struck down in Griswold was of this kind.

Perry, Ethical Function, supra note 165, at 727; cf. Freund, supra note 41, at 1480 (suggesting that "[t]he recent Court, by and large, has set aside old laws, laws having to do with segregation, illegitimacy and abortion that may or may not represent a contemporary consensus and that may represent political stasis and abnegation").

On a different level, the problem of legislative inattention may justify, at least to some extent, increased judicial scrutiny of laws that adversely affect groups who have been consistent losers in the political process on a wide variety of matters. In considering such a law, there is less-than-usual reason to believe that the legislative process has included a careful consideration of the moral issues at stake, for the arguments of the disadvantaged group, if past history is any guide, might well have been ignored. See generally United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that a more searching judicial inquiry may be appropriate when reviewing statutes that disadvantage "discrete and insular minorities" who cannot protect themselves through the ordinary political process).
ordinarily must be taken to reflect the contemporary national morality. By contrast, the legislative decisions of a state (or some political subdivision) may reflect only a local morality and not the national morality at all. For example, one state’s harsh punishment for a particular crime may deviate sharply from the treatment of that crime prevailing in other states, that is, deviate sharply from the prevailing national standard. With the transportation and communications revolution that we have witnessed in this century, ours has become a shrinking nation and indeed a shrinking planet. As a result, our political community has grown to become predominantly national in charac-

169. A recent congressional enactment typically is the best available evidence of the nation’s contemporary moral standards. But there may be other indicia as well, such as recent action by a number of state legislatures, contemporary societal customs and practices, and public opinion itself. These other indicia might occasionally be strong enough to overcome the evidence of the contemporary national morality that is provided by recent federal legislation. Cf. Perry, Ethical Function, supra note 165, at 727 (“[A] piece of legislation might have been put on the books only because a sufficiently interested minority has lobbied—and perhaps bartered—for it.”). See generally Is Congress for Sale?, U.S. NEWS & WORLD REP., May 28, 1984, at 47, 47 (critics charge that influence peddling in exchange for campaign contributions “smacks of ‘Congress on the auction block’”). At least when the legislative record reveals a careful and thoughtful consideration of the moral issues at stake, however, the Supreme Court should generally defer to any recent congressional enactment. Cf. C. BLACK, DECISION ACCORDING TO LAW 41 (1981) (“As to issues of national consensus, the presumption has to be that Congress is the empowered voice.”) (emphasis in original); Sandalow, supra note 168, at 1181-90 (arguing for judicial deference to congressional and other broadly based political decisions, when deliberately made, as authoritative statements of contemporary constitutional values). See generally Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (“Whenever called upon to judge the constitutionality of an Act of Congress . . . the Court accords ‘great weight to the decisions of Congress.’ . . . The customary deference accorded the judgments of Congress is certainly appropriate when, as here, Congress specifically considered the question of the Act’s constitutionality.”) (quoting Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm., 412 U.S. 94, 102 (1973)); Fullilove v. Klutznick, 448 U.S. 448, 552 (1980) (Stevens, J., dissenting) (“I would hold this statute unconstitutional . . . because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way.”).

The Supreme Court’s pattern of decision suggests that the Court does tend to respect contemporary congressional judgments concerning national moral values. Interpreting data compiled by Robert Dahl, for example, Professor Tushnet (making a point quite different from mine) has concluded that with respect to federal legislation, “in most cases the Court [has] invalidated statutes enacted years before, where support by contemporary political majorities was questionable.” See Tushnet, Legal Realism, Structural Review, and Prophecy, 8 U. DAYTON L. REV. 809, 812 (1983); see also Dahl, Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker, 6 J. PUB. L. 279 (1957).

170. See infra notes 213-23 and accompanying text.
The need for both intranational fairness and international leadership has led the American morality to demand consistent national standards for the protection of individual rights, standards beneath which no state or locality can be permitted to fall.171 Thus, when the Supreme Court exercises nonoriginalist review with respect to state and local practices, many of its decisions can be understood as applications of those national standards to wayward governmental practices.172

A significant portion of the modern Supreme Court's constitutional decisions therefore can be explained as exercises of nonoriginalist review drawing decisional norms from America's contemporary morality. These are among the Court's less controversial nonoriginalist decisions, however, for the Court, in effect, is upholding dominant national values; the "majoritarian" practices it invalidates are either ones that have suffered from legislative inattention or that represent only a minority opinion in the national political community. Through this type of nonoriginalist review, the Court acts to bring lagging governmental practices in line with the advance of contemporary moral thought.

The Court faces its most difficult decisions when it considers governmental practices that are consistent with the contemporary national morality but that may conflict with the emerging pattern of American morality. In terms of constitutional theory, the question becomes whether the court can test the validity of governmental practices by reference to standards of morality that are likely to prevail in the future. For the

171. Cf. C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 75 (1969) ("In policing the actions of the states for their conformity to federal constitutional guarantees, the Court represents the whole nation, and therefore the whole nation's interest in seeing those guarantees prevail, in their spirit and in their entirety."). But cf. Maltz, Federalism and the Fourteenth Amendment: A Comment on DEMOCRACY AND DISTRUST, 42 OHIO ST. L.J. 209, 221 (1981) ("[L]ocal autonomy is a key concept in the American system, and . . . finding a value to be constitutionally protected erodes this concept by forcing national standards on both the political and judicial branches of state governments.").

172. Indeed, the difference between national and local majoritarian policy making may well explain why the vast majority of cases in which the Supreme Court invalidates governmental practices involve state or local practices, not federal ones. Cf. Marsh v. Chambers, 103 S. Ct. 3330 (1983) (upholding constitutional validity of Nebraska legislature's use of a publicly paid chaplain, in part because of consistent congressional adherence to a similar practice). But cf. Miller v. California, 413 U.S. 15, 30-34 (1973) (adopting local standards for defining obscenity under first-amendment doctrine). See generally infra note 201.
Court to undertake such a task would require it, in effect, to predict the course of moral progress.

Prediction is a hazardous business, and especially so in the context of morality. But as the Supreme Court's risk of error increases, so too does the potential benefit from its decision. For the Court to recognize individual rights in accordance with emerging moral principles is for it to do more than uphold the advancing pattern of American morality; it is for it to accelerate the advance—to push America forward in its search for moral truth.

If any one case exemplifies both the risk and the potential gain of such a moral prediction, it is *Brown v. Board of Education*. The contemporary morality of 1954, as evidenced by widespread governmental practices, continued to support segregated schooling, although the movement for racial equality was growing. In retrospect, one can see the Court's decision as propelling this movement forward to the point that there exists today a general consensus supporting the basic result in *Brown*.

Other constitutional decisions also can be cited as evidence of the Supreme Court's attempt to predict moral development. In its 1973 decision in *Roe v. Wade*, for example, the Court recognized a constitutional right to obtain an abortion free from most governmental restraints. Whether the Court in *Roe* correctly identified the emerging morality concerning abortion remains to be seen, although it appears that a majority of Americans now joins the Court in supporting at least a limited right to abortion. Likewise, the Court's consideration of the

173. See J. ELY, supra note 7, at 69-70.

174. Cf. A. BICKEL, supra note 9, at 239 (“[T]he Court should declare as law only such principles as will—in time, but in a rather immediate foreseeable future—gain general assent.”). See generally A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 90 (1970) (“The Supreme Court's judgements may be put forth as universally prescriptive; but they actually become so only when they gain widespread assent. . . . [T]he Court's judgements need the assent and the cooperation first of the political institutions, and ultimately of the people.”).


176. See generally supra notes 33-36 and accompanying text.

177. This explanation of *Brown* implies that, even absent the Court's decision, the American morality eventually would have come to demand an end to official segregation. In the exclusive hands of majoritarian officials, however, the eradication of de jure segregation might have taken decades longer.


179. See M. PERRY, supra note 2, at 145. See generally Perry, Ethical Function, supra note 165, at 735-36 (“In retrospect, it seems that the Court, in de-
death penalty can be interpreted as a (halting) attempt to identify the trend of moral thinking on this issue.\textsuperscript{180}

The pattern of American moral development, as revealed by the past, the present, and the emerging future of the American people, is an external source of constitutional norms that keeps faith with the Supreme Court’s judicial office. The judicial role, however, requires not only that the Court’s source of decision be external. It requires as well that the source be one with which the Court has competence to work: the Court must have the ability to identify the governing decisional norms by deriving them from their source with some assurance of accuracy.\textsuperscript{181}

In the abstract, a source of norms may appear to be ideally suited for use in constitutional adjudication. In other words, the source may house norms that properly ought to be used in testing majoritarian decisions concerning individual rights. A source of norms is useless, however, unless the Court can determine what norms the source provides and how those norms should be implemented as principles of constitutional law. If the pattern of American moral development is, in theory, an appropriate source of decisional norms, it can be useful in constitutional adjudication only to the extent that the Court can identify the governing norms with some degree of confidence and apply those norms through the process of judicial decision making.\textsuperscript{182}


\textsuperscript{181} An inquiry into judicial competence frequently centers on the training and experience of judges, and these factors are indeed important. The ultimate criterion of competence, however, is whether judges can identify and apply the correct rules of law (in light of whatever standards of “correctness” might be appropriate). To the extent that the correct rules of law are readily discoverable, for example, judges may be competent without regard to their training or experience. As a result, judicial competence varies not only with judicial training and experience but also with the source of decision, the source of governing norms.

\textsuperscript{182} Perry contends that our pluralistic society holds values so diffuse and fragmented that national moral values simply cannot be isolated for use in constitutional adjudication. See M. Perry, supra note 2, at 93-97. For the reasons discussed in the text, I disagree.

To be sure, problems of judicial competence do exist under the model that I have drawn, for the selection of norms from the pattern of American moral
As discussed earlier, the Court's ability to identify the pattern of American morality varies with the point on that pattern to which the Court directs its attention. The Court has a greater competence to determine contemporary moral values than it does to divine emerging moral principles that have not yet gained national acceptance. The Court's competence also may vary with the subject matter under consideration. For example, the training and experience of a judge might provide greater expertise concerning procedural, as opposed to substantive, issues. As a result, the judge might have greater competence in determining the pattern of moral development concerning such issues and might be better able to formulate rules of law consistent with that pattern.

In the final analysis, the proper scope of nonoriginalist review depends on its utility in furthering America's progress on its path of moral development. This utility, in turn, depends on two interrelated factors. First, the utility is greater when the Court's recognition of a constitutional right would tend to accelerate, and not merely uphold, the pattern of American moral growth. Thus, when the Court looks beyond the present to emerging moral principles, its constitutional decisions hold the highest potential for gain. Second, the utility of nonoriginalist review varies with the Supreme Court's competence to derive and articulate constitutional rights consistent with the evolving pattern of American morality. The Court's competence varies by subject matter and also with the degree to which the pattern of American morality has developed. As to any given subject, the Court's competence varies inversely with the potential utility of its decision. Accordingly, when the Court looks beyond the contemporary morality to the future course of moral progress, the potential utility of its decision increases, but so too does the risk of error. Only when the potential gain outweighs the risk ought the Court to undertake such a venture.\[183\]

development does not approach an exact science. It is no less exact, however, than attempts to decide constitutional cases by reference to the framers' "general intentions" (here I include Dean Ely's model, see supra J. ELY, note 7) or through some method of moral philosophy. Moreover, the constitutional theories that arguably tend to avoid these problems of competence, such as pure originalism or Perry-style nonoriginalism (the justices obviously can identify their own values, see supra text accompanying note 122), raise other sorts of problems that are ultimately much more troublesome. See generally supra Parts I & II.B.

183. In describing the proper role of the Supreme Court in defining constitutional rights, I have focused primarily on the creation of new constitutional
B. THE SUPREME COURT AS AN OBJECT OF RESPECT:
MAJORITARIAN CONSENT TO THE PROCESS OF
NONORIGINALIST REVIEW

Under the model of nonoriginalist review I have proposed, the Supreme Court, within limits, can serve a vital function by furthering the cause of American moral development and thereby (indirectly) furthering the search for morally right answers. Nevertheless, utility alone is insufficient to demonstrate the propriety of this model for a democratic society. The principle of majoritarian consent still must be addressed.¹⁸⁴

The United States, of course, is a representative democracy, doctrine not preordained by existing Supreme Court precedent. Precedent, however, does guide the Court in many of its constitutional rulings. See generally Sedler, The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective, 44 OHIO ST. L.J. 93, 118-19 (1983) (noting that the incremental development of constitutional law properly serves to constrain Supreme Court decision making). Moreover, by relying upon, distinguishing, or even overruling its prior decisions, the Court serves an additional function concerning the growth of American moral thought. As the Court develops its constitutional precedents, it tends to bring together various strands of the evolving national morality into a body of constitutional doctrine that is logically consistent and coherent. For example, in its equal-protection decisions, much of the Court's work involves analogizing different forms of discrimination to discrimination based on race, a type of discrimination that society clearly recognizes as offensive. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 167, at 682-734 (discussing equal-protection doctrine governing legislative classifications based on alienage, illegitimacy, gender, and wealth). In attempting to reconcile and harmonize its constitutional decisions, the Court is also, in effect, attempting to reconcile and harmonize various aspects of the evolving American morality, a morality that is necessarily protean but that ought not to be chaotic.

There is a danger, of course, that the Court might “harmonize” its precedents at such a high level of abstraction that the Court would be disregarding important societal values that should more specifically guide its decision. One could argue that the Court's opinion in Roe v. Wade, 410 U.S. 113 (1973), reflects this type of problem:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. . . . [These decisions] make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.

This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. Id. at 152-53 (citations omitted); see Holland, American Liberals and Judicial Activism: Alexander Bickel's Appeal from the New to the Old, 51 IND. L.J. 1025, 1050 (1976) (“The broadly cited precedents were so far afield and wide-ranging that they could have been invoked to support virtually anything the Court was prepared to hold.”).

¹⁸⁴. See supra text accompanying note 129.
racy, and majoritarian consent is ordinarily evidenced through the actions or inactions of elected officials. Before elected officials can consent to a practice, however, they must be aware of the practice to which they are consenting. Moreover, the officials must have the power to accept or reject the practice, and they must choose to accept it. I believe that the United States Congress, having the power to reject it, has knowingly accepted and continues to accept nonoriginalist review of the basic sort I have described, thereby satisfying, at least to some degree, the principle of majoritarian consent.185

The question of congressional knowledge is not merely whether Congress is aware that the Supreme Court exercises nonoriginalist review. Proof of that basic knowledge, of course, is essential for a finding of congressional consent, but it would not reveal the parameters of such a consent. To determine those parameters, one must determine the type of nonoriginalist review, if any, of which Congress is aware. As a result, one must examine more specifically the nature of congressional perceptions concerning the method by which the Supreme Court decides issues of individual rights.

Most congressional knowledge about Supreme Court review likely is gained from the Court's published opinions. Given the public importance of these opinions and their ready availability, Congress either is,186 or can properly be presumed to be,187 familiar with the Court's reasoning, at least when the Court renders important decisions concerning individual rights. Congress therefore has actual, or at least imputed, knowledge of the Court's own statements about its method of decision.

A casual reading of the Supreme Court's opinions might suggest a decision-making process that is purely originalist, for

185. Coming from a body that represents all Americans, Congress's knowing acceptance of the practice embodies the representative consent of the American polity as a whole. See generally Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954) (arguing that the interests of the states are represented in the national government).

186. A large number of Representatives and Senators, of course, are lawyers; these members of Congress are likely to take a special interest in the Supreme Court's opinions.

187. Surely Congress—the veritable bastion of American government "by the people"—has a duty to investigate the basic method by which the judiciary determines whether majoritarian policies, including those of Congress itself, will be permitted to stand or instead will be nullified in favor of individual rights. At the very least, Congress has a duty to examine what the Supreme Court itself says of its role in defining constitutional rights.
the Court typically starts its constitutional analysis with a historical examination of the framers' intentions. This is hardly surprising, however, even for a Court that is willing to exercise nonoriginalist review. If the original understanding of the Constitution itself calls for an invalidation of the majoritarian practice under attack, the Court's analysis needs to go no further. Moreover, even if the originalist inquiry is inconclusive, it may nonetheless provide relevant guidance in conjunction with other, nonoriginalist considerations. In other words, even when the framers' intentions are insufficiently clear to support an originalist constitutional right, those intentions may tend to support the recognition of a (nonoriginalist) constitutional right when the pattern of American morality also tends to so indicate.

Although the modern Court's constitutional analysis generally begins with history, it almost never ends there. The Constitution, as originally understood, properly stands as the Supreme Court's center of gravity and its point of analytical departure, but the Court's originalist review rarely provides sufficient guidance to justify the recognition of a constitutional right. Thus, the Court's analysis ordinarily proceeds to other considerations, considerations that are nonoriginalist in character. For example, although the Court in Brown v. Board of Education conceded that the history of the fourteenth amendment did not itself call for an invalidation of segregated schooling, the Court nonetheless went on to invalidate that practice on the basis of other normative considerations—considerations that necessarily came from some source beyond the original understanding of the Constitution.

The Court not only has relied openly on nonoriginalist considerations, it also has described more precisely the role that it

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189. Recall that nonoriginalist review begins the moment the Court moves beyond the intentions of the framers, regardless of whether the framers' intentions have first been consulted. See supra text accompanying notes 41-46.


191. See supra notes 34-35 and accompanying text.

192. See supra text accompanying notes 33-36. The Court in Brown observed: "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when Plessy v. Ferguson was written." Brown, 347 U.S. at 492.
claims for itself in the exercise of nonoriginalist review. Although the Court does not invariably specify the nature of its nonoriginalist function, it does so more often than some scholars are willing to admit.193 Moreover, when it does speak on this matter, the Court's descriptions suggest that it in fact exercises nonoriginalist review in a manner similar to that which I have argued ought to be the case.

In Rochin v. California,194 the Supreme Court held that California police had violated a criminal suspect's due-process rights when they administered a stomach pump against his will to obtain evidence of illicit narcotics. The Court's description of its constitutional role in individual-rights cases, and especially under the due-process clause, merits extended quotation:

In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions. Words being symbols do not speak without a gloss. On the one hand the gloss may be the deposit of history, whereby a term gains technical content. . . . On the other hand, the gloss of some of the verbal symbols of the Constitution does not give them a fixed technical content. It exacts a continuing process of application.

When the gloss has thus not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges. . . .

The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process. . . .

. . . .

Restraints on our jurisdiction are self-imposed only in the sense that there is from our decisions no immediate appeal short of impeachment or constitutional amendment. But that does not make due process of law a matter of judicial caprice. The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not ad hoc and episodic but duly mindful of reconciling the needs both of continuity and of changes in a progressive society.195

193. See, e.g., Berger, supra note 18, at 516 n.344; Bork, supra note 9, at 3-4.
195. Id. at 169-72 (citing B. CARDOZO, supra note 81) (other citations and footnotes omitted) (emphasis added); cf. id. at 177-78 (Douglas, J., concurring) ("The evidence obtained from this accused's stomach would be admissible in
To the same effect is Justice John Harlan's opinion in *Poe v. Ullman*,196 which involved a substantive due process challenge to a Connecticut statute criminalizing the use of contraceptives even by married persons:197

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. *The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court that radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.*198

The source of decisional norms that Harlan describes is not the original understanding of the Constitution,199 but neither is it the judges' own values.200 Rather, it is the "living tradition" of American historical progress, a concept consistent with what I have called the pattern of American moral development.201

the majority of states where the question has been raised. . . . Yet the Court now says that the rule which the majority of the states have fashioned violates the 'decencies of civilized conduct.' To that I cannot agree.").


197. A majority of the Court held that the appeal should be dismissed for lack of a justiciable "case or controversy." Justice Harlan dissented from this dismissal and would have found the contraceptive ban unconstitutional. *See id.* at 522-55 (Harlan, J., dissenting); *see also* Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating the same Connecticut statute as that attacked in *Poe*).

198. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (emphasis added); *see also Poe*, 367 U.S. at 518 n.9 (Douglas, J., dissenting) (noting that "due process follows the advancing standards of a free society") (citation omitted).

199. *See Poe*, 367 U.S. at 540 (Harlan, J., dissenting) (observing that the history of the fourteenth amendment "sheds little light" on the meaning of due process).

200. Justice John Paul Stevens has written:

Some students of the Court take for granted that our decisions represent the will of the judges rather than the will of the law. This dogma may be the current fashion, but I remain convinced that such remarks reflect a profound misunderstanding of the nature of our work. Unfortunately, however, cynics—parading under the banner of legal realism—are given a measure of credibility whenever the Court bases a decision on its own notions of sound policy, rather than on what the law commands. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 104 S. Ct. 1776, 1798 (1984) (Stevens, J., dissenting) (footnotes omitted).

201. Indeed, Justice Harlan's specific conclusion in *Poe* depended on moral standards arguably drawn from America's contemporary national morality:
In *Moore v. City of East Cleveland*, the Supreme Court invalidated a housing ordinance that limited the occupancy of a dwelling unit to members of a single nuclear family, holding that the ordinance violated the due process rights of other relatives who wished to live together. Writing for a plurality of four, Justice Lewis Powell quoted Harlan's description of the Court's function in giving content to the due-process clause, emphasizing the importance of that function but cautioning as well that "such judicial intervention [must not be based merely on] the predilections of those who happen at any time to be Members of this Court." "Appropriate limits on substantive due process," Powell stated, "come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" Although dissenting from the Court's decision,
Justice Byron White did not take issue with the plurality's method of analysis:

[We must always bear in mind that the substantive content of the [Due Process] Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than an accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments. This is not to suggest, at this point, that any of these cases should be overruled, or that the process by which they were decided was illegitimate or even unacceptable ... ]

But "the present construction of the Due Process Clause," White continued, "represents a major judicial gloss on its terms, as well as on the anticipation of the Framers." But "the present construction of the Due Process Clause," White continued, "represents a major judicial gloss on its terms, as well as on the anticipation of the Framers."207

The plurality opinion in Moore also suggested that other of the Court's decisions concerning individual rights, including those decided under the equal-protection clause, were based on similar, plainly nonoriginalist, considerations.208 In this, the opinion reaffirmed what the Court had said in Harper v. Virginia Board of Elections:

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.210

Citing Brown v. Board of Education's rejection of the "separate-but-equal" doctrine previously endorsed in Plessy v. Ferguson,211 the Court in Harper asserted that equal-protection claims must be heard with "a contemporary ear."212

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207. Id. at 544 (White, J., dissenting); see id. (White, J., dissenting) (observing that substantive-due-process decisions are made "without express constitutional authority").
208. Moore, 431 U.S. at 503 n.10 (plurality opinion). In particular, the opinion referred not only to the Court's recognition of individual rights under the equal-protection clause, but also to its decisions (selectively) applying the Bill of Rights to the states, even though its provisions were originally designed only for application to the federal government. See generally supra note 47.
209. 383 U.S. 663 (1966). In Harper, the Court invalidated Virginia's poll tax as a violation of the equal-protection clause, noting that "[o]nly a handful of States" continued to employ such taxes at the time of the Court's decision. See id. at 666 n.4.
210. Id. at 669 (emphasis in original) (citation omitted).
211. 163 U.S. 537 (1896).
212. See Harper, 383 U.S. at 669; see also id. at 672 (Black, J., dissenting) ("[T]he Court's opinion reveals that it [overrules existing precedent] not by using its limited power to interpret the original meaning of the Equal Protection Clause, but by giving that clause a new meaning . . . "); Regents of the Univ.
The Court often finds some guidance in a historical, originalist analysis, but then proceeds to consider other, nonhistorical factors as well. In elaborating the eighth amendment's prohibition on cruel and unusual punishment,213 for example, the Supreme Court finds historic support for the general notion that a punishment must not be disproportionate to the crime.214 The Court gives content to that general prohibition, however, by "draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society."215 Thus, the constitutional prohibition "has been interpreted in a flexible and dynamic manner;"216 it "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."217 The standards to which the Court refers in these cases, however, are American standards, not personal ones:

These constitutional judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, must be given to the public attitudes concerning a

of Cal. v. Bakke, 438 U.S. 265, 404-05 (1978) (Blackmun, J.) (separate opinion) ("I, of course, accept the proposition[] that ... the Fourteenth Amendment has expanded beyond its original 1868 concept and now is recognized to have reached a point where ... it embraces a 'broader principle.'") (quoting McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 296 (1976)).

213. This prohibition has been applied to the states through the fourteenth amendment. See, e.g., Robinson v. California, 370 U.S. 660 (1962).

214. See, e.g., Solem v. Helm, 103 S. Ct. 3001, 3006-07 (1983). The Court's historical analysis is necessarily based on "very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights." See Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring); see also id. at 263 (Brennan, J., concurring) ("[W]e cannot now know exactly what the Framers thought 'cruel and unusual punishments' were."); cf. Solem v. Helm, 103 S. Ct. at 3021 (Burger, C.J., dissenting) ("Although historians and scholars have disagreed about the Framers' original intentions, the more common view seems to be that the Framers viewed the Cruel and Unusual Punishments Clause as prohibiting the kind of torture meted out during the reign of the Stuarts.") (footnote omitted).

215. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); cf. Furman v. Georgia, 408 U.S. 238, 265 (1972) (Brennan, J., concurring) (observing that the Court has rejected a "historical" interpretation of the Cruel and Unusual Punishments Clause under which the clause would have been limited to inherently barbarous punishments).


217. Weems v. United States, 217 U.S. 349, 378 (1910). The Weems decision might be read as an early harbinger of the modern Supreme Court's approach to constitutional restraints on government: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth." Id. at 373.
particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.218

Accordingly, the Court's analysis includes a comparison of the penalty under review with penalties imposed for similar crimes within the same jurisdiction and in other American jurisdictions as well.219 Consequently, the Court has invalidated the death penalty for a defendant who aided and abetted a felony-murder but who did not intend that a life be taken, in part because "only about a third of American jurisdictions would ever permit [such a defendant] to be sentenced to die,"220 and even those jurisdictions had rarely imposed the penalty.221 Likewise, the Court has struck down a life sentence for a nonviolent recidivist when the defendant apparently had been "treated more severely than he would have been in any other State."222 This type of comparative analysis suggests a rather straightforward assessment of the contemporary American morality.223

In its eighth amendment cases, the Court has also com-
pared the penalty under attack with penalties imposed in foreign countries. In so doing, the Court may be suggesting that foreign practices more protective of individual rights than our own eventually may come to command American acceptance. Those practices may thus reflect points on the emerging pattern of American morality.

Perhaps I am overstating the case. Perhaps the Court has not made it clear that it decides individual-rights cases by a method akin to reliance on the pattern of American moral de-


225. See Furman v. Georgia, 408 U.S. 238, 371 (1972) (Marshall, J., concurring) ("We achieve 'a major milestone in the long road up from barbarism' and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.") (footnotes omitted).

226. If moral developments abroad concerning the death penalty in fact portend moral thinking in the United States, it appears that the Court might better further the cause of American moral evolution by proscribing the penalty absolutely:

The U.S. is almost the only industrialized nation outside the Communist bloc that still executes people.

Britain first banned the death penalty in 1965, joining such nations as West Germany, Israel and Italy, which had acted in the 1940s and 1950s. Canada followed suit in 1976 and France in 1981, leaving the U.S. and Turkey as the only NATO nations with executions.
velopment. Indeed, in many opinions the Court does not elaborate its nonoriginalist mode of analysis at all.227 Nonetheless, the Court certainly has not ignored "the fundamental question of the role of judicial review in a democratic society."228 Moreover, a fair reading of the Court's constitutional decisions reveals not only that the Court frequently grounds its decisions on norms beyond those provided by the framers but also that those norms are not drawn from the justices' individual moral values. From the Court's own reasoning, then, Congress would properly conclude, at a minimum, that the Court does exercise nonoriginalist review and does so by reference to norms derived from some external source of decision, a source outside the justices' personal schemes of morality.229

Direct evidence of congressional thinking, albeit limited in quantity, appears to confirm a congressional perception that the Supreme Court exercises nonoriginalist review by reference to norms drawn from an external source. The best evidence derives from the periodic legislative efforts to contract the Court's decision-making jurisdiction and from the congressional reaction to these proposals. One modern effort occurred in the late

227. Often, of course, the Court is merely refining the contours of a constitutional right recognized by prior decisions, and its reasoning may therefore depend largely on existing precedent. See City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2487 (1983) (commenting that "the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law") (footnote omitted); see also supra note 183.

228. See Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting). Justice Rehnquist aptly posed the question in the following terms: "How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?" Id. (Rehnquist, J., dissenting).

229. Congress might inaccurately conclude that the Supreme Court's authority to render decisions going beyond the framers' particular intentions is somehow traceable to the historic adoption of the Constitution, see supra note 20, or that the Court's decision-making role is based on a broad view of "originalism," giving effect to the framers' "general" or "broad" goals, see supra text accompanying notes 41-46; cf. School Dist. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring) (suggesting that "our use of the history of [the framers'] time must limit itself to broad purposes, not specific practices"). Even if Congress were so misinformed, however, it would be misinformed only as to the perceived basis of judicial authority for a method of constitutional decision not tied to historical considerations. It would not be misinformed as to the method of decision itself. As long as Congress has the power to accept or reject that method of decision, see infra text accompanying notes 244-55, congressional beliefs concerning how or why the Court has claimed the authority to use such a method are largely beside the point.
1950's, when the Jenner-Butler bill responded to Supreme Court decisions concerning antisubversive laws by proposing to eliminate the Court's jurisdiction to hear certain constitutional challenges. More recently, numerous jurisdiction-limiting bills have been introduced attacking the Court's decisions concerning abortion, school prayer, and busing for school desegregation. To date, no modern bill has been enacted.

Looking first to the congressional advocates of these various proposals, surely they believe the Supreme Court relies on norms beyond those constitutionalized by the framers. Indeed, the common purpose of these efforts is "to halt the incursions of the Court into the legislative field," to stop the Court from "distorting the work of the authors of the Constitution." Many of those who attack the Court doubtless believe not only

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231. For partial listings of these proposals, see supra note 138.
232. Following the Civil War, Congress did enact legislation depriving the Supreme Court of jurisdiction in habeas corpus proceedings alleging constitutional violations. See Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1868).
During a 1980 debate, Senator Hatch requested that the following statement be printed in the Congressional Record:

"Over the past twenty-five years, the Supreme Court has been racing ahead of other governmental institutions in effecting changes in national social policy and in society itself. Indeed, the Court has been fashioning a national social policy for the first time . . . through the succession of controversial Supreme Court decisions on desegregation, reapportionment, school prayer, capital punishment, criminal
that the Court’s review is nonoriginalist but also that the Court’s decisions are based on the justices’ personal values.\textsuperscript{235} Whatever the views of these advocates, however, they cannot support the conclusion that Congress has consented to the Court’s nonoriginalist function, for these members of Congress would \textit{reject} that function.

The more relevant inquiry is into the beliefs of those who have successfully \textit{defended} the Supreme Court’s decision-making role by opposing limitations on the Court’s jurisdiction. Some of the Court’s congressional defenders equate the Court and its decisions with “the Constitution,”\textsuperscript{236} thus arguably expressing a belief that the Court’s role is originalist only. In the full context of their arguments, however, it appears more likely that they are defending a process of decision making, a process that, although nonoriginalist, has grown to become a basic, organic part of the American constitutional system.\textsuperscript{237} In re-

\begin{itemize}
  \item procedure, school busing, pornography, abortion and reverse discrimination . . . .
  \item “Such a role for ‘the judicial power’ is not provided for in the Constitution nor was it ever contemplated by the Constitutional Convention of 1787.”
\end{itemize}


\textsuperscript{235} See Cohodas, \textit{Members Move to Rein in Supreme Court}, CONG. Q., May 30, 1981, at 947, 948 (“‘The federal judiciary has been courting constitutional disaster by reading its own predilections into the nation’s foundational document.’”) (quoting Sen. Hatch); see also 104 CONG. REC. S18646 (1958) (statement of Sen. Butler) (contending that the Supreme Court has “sought to substitute the Court’s judgment . . . for the judgment of the Founding Fathers with respect to the meaning and effect of the Constitution of the United States.”); cf. \textit{id.} at S18645 (statement of Sen. Jenner) (“Now, by the Jenner-Butler bill we are asking Congress to protect itself and the country against the usurpation of this runaway, wild Court, which is tearing down the Constitution of the United States.”).

On this particular issue, these antagonists of the Supreme Court find themselves in agreement with Professor Perry, a strong supporter of judicial activism. It seems that constitutional theory, like politics, is the maker of strange bedfellows. See generally O’Fallon, supra note 122, at 719.

\textsuperscript{236} See, e.g., 128 CONG. REC. S11620 (daily ed. Sept. 16, 1982) (statement of Sen. Baucus) (“[I]f we ever pass a statute which prohibits the U.S. Supreme Court from reviewing any constitutional issue, we shall be sliding down the slippery slope toward obliteration and destruction not only of the Supreme Court, but the U.S. Constitution.”).

\textsuperscript{237} See 104 CONG. REC. S18680 (1958) (statement of Sen. Javits) (“The very essence of constitutional government requires a final court to determine what is and what is not the paramount law of the land. Congress cannot do it by amendments which it adopts day in and day out, and year in and year out.”); \textit{id.} at S18683 (statement of Sen. Wiley) (“[T]o do violence to the American tradition by denigrating the eminence and the prestige, the honor and the power of the Supreme Court of the United States, is to do violence to the con-
sponding to the Court’s antagonists in 1958, for example, Senator Javits hardly portrayed an originalist Court:

[The Jenner-Butler] bill is based upon a misconception of the nature of the Constitution of the United States and the function which the Court performs in interpreting it.

One ground of complaint against the Court appears to be that in deciding constitutional questions it refuses to be bound solely by precedents . . . .

The fundamental question, I believe, is: Should legal philosophy be compatible with changes in the social development of the country; or must legal philosophy follow what we lawyers call stare decisis . . . ?

. . . . I think the people will want the Supreme Court to remain unimpaired and to take actions compatible with the Constitution and with the conditions existing in the country, as regards public opinion and influence . . . . [O]ne of the finest traditions of [the legal profession] is to make sure that the weak, the oppressed, the unpopular, those whom the public may wish to run out of town on a rail, enjoy the same fundamental human rights and constitutional rights which we expect to have conferred upon every citizen. We have learned the hard way that only in that way can the individual be protected; and that goes for every individual, including those who now may be highly dissatisfied with many of the Court's decisions.

. . . . [I]t is the appropriate function of the Supreme Court of the United States to interpret the provisions of our Constitution in the light of changing time and conditions. 238

Speaking on the same bill, Senator Hennings argued:

We know that the Court itself divides. We know that many of these questions are indeed very close questions of law. We know that the law is not immutable, but is protean. It changes constantly to conform to human progress and to the advances made in this great land of ours, all of which are to the advantage of society and for the safety, security, and welfare of the people. Therefore, all of these factors bear upon the question. The Supreme Court does not rigidly hand down opinion after opinion predicated upon something that happened 100 years ago and law that was laid down 100 years ago. The Supreme Court must consider many diverse factors that arise in the course of human events . . . .

We have many statutes which must be interpreted afresh and looked at anew by the Court because of the advance of society. 239

cept of freedom and by that much to throw dust in the face of the whole Free World in a moment of its acutest peril.”); id. at S18685 (statement of Sen. Hennings) (“[The Jenner-Butler bill] is contrary to our historic principle that the Supreme Court should have the final word as to the constitutionality of governmental action.”).

238. Id. at S7844-45, S7849 (statement of Sen. Javits) (emphasis added).
Although the evidence suggests that the Supreme Court’s defenders are well aware that the Court’s constitutional review is nonoriginalist, there is no evidence that they believe the Court acts upon the moral values of the justices. To the contrary, they are defending “a government of laws, not a government of men.”

Unlike many of the Court’s antagonists, its defenders believe that the justices of the Supreme Court decide constitutional cases by a process of judicial reasoning, not by grafting their personal values into the Constitution. The former is considered legitimate, the latter is not.

See generally 104 CONG. REC. S18692 (1958) (statement of Sen. Lausche) (“We look upon the Court as the repository of all that is right and good.”).


241. Although their perceptions otherwise differ, however, the Court’s defenders and its antagonists both recognize the obvious: that the Supreme Court goes beyond the framers’ intentions and recognizes constitutional rights based at least in part on other, nonoriginalist considerations. See M. PERRY, supra note 2, at 141 (observing that significant segments of the polity, including members of Congress, are “well aware that the Court’s most controversial constitutional decisions—the decisions that engage the polity’s attention in the first place—are compelled by neither constitutional text nor original understanding”); see also, e.g., 127 CONG. REC. S6646 (daily ed. June 22, 1981) (statement of Sen. Johnston) (describing school-desegregation decisions as “a brave experiment of the Court, taken as against a background of the overriding national need to eliminate segregation”); 126 CONG. REC. 29,476-77 (1980) (statement of Sen. Hollings) (“I believe very strongly that there is no doubt that we are not constitutionally going backward on civil liberties or civil rights.”); 104 CONG. REC. S18693 (1958) (statement of Sen. Ervin) (claiming that “the doctrine of stare decisis does not apply to decisions in constitutional matters . . . [which] may be changed at any moment”) (paraphrasing Justice Douglas); id. at S18694 (statement of Sen. Ervin) (asserting that “the Supreme Court says it does not stand by decisions on constitutional questions”); cf. 127 CONG. REC. S7403 (daily ed. July 9, 1981) (statement of Sen. Durenberger) (arguing that, in light of a perceived curtailment by the Supreme Court of its judicial role, “[o]ur past practice of avoiding an issue in the hope that it will be settled in the courts is no longer viable.”). See generally 104 CONG. REC. S18692 (1958) (statement of Sen. Lausche) (“We look upon the Court as the repository of all that is right and good.”).

242. Cf. 104 CONG. REC. S18646 (1958) (statement of Sen. Butler) (“The question is . . . whether the Supreme Court will be required to return to its original role—to serve solely as a judicial institution.”).
Court's defenders, unlike its antagonists, generally believe that the Court has remained within its legitimate judicial function.

To date, the prevailing forces in Congress have resisted efforts to restrict the role of the Supreme Court by contracting its jurisdiction, apparently with a recognition that the Court engages in nonoriginalist review but with no thought that the Court might be recognizing constitutional rights by reference to the justices' own moral values. Although the direct evidence of congressional perceptions is not overwhelming, it does tend to confirm a congressional understanding similar to that which might be gleaned from the Supreme Court's published opinions. It thus seems a fair conclusion, if not an inescapable one, that the members of Congress who have successfully opposed the various jurisdictional proposals have been aware that the Court draws decisional norms from some nonoriginalist, but external, source of decision. 243

Despite its knowledge of the Supreme Court's basic method of decision, Congress has not acted to curb the Court's decision-making role. Congress's knowledge and inaction, however, are insufficient to establish congressional, and thereby majoritarian, consent to the Court's exercise of nonoriginalist review. Congress must also have the power to reject the practice and must know of its power.

In identifying the source of congressional power to control the Supreme Court, I join Perry and others before him, in relying primarily on the exceptions clause of article III. 244 Under

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243. This conclusion is supported not only by the available direct evidence but also, and alternatively, on the ground that Congress is, or can be presumed to be, familiar with the Supreme Court's statements concerning its mode of constitutional decision. See supra notes 186-87 and accompanying text; see also supra text accompanying notes 188-229.


As Perry notes in his book, controls such as the process of judicial appointment and that of constitutional amendment are inadequate to reconcile nonoriginalist review with the principle of majoritarian consent. See supra note 88 and accompanying text. In a new essay, however, Perry has reversed his position, asserting that "[t]he various mechanisms of political control or influence over the Court . . . are adequate even if the Court refuses to concede to Congress the broad jurisdiction-limiting power I discussed in my book." M. Perry, supra note 25, at — (footnote omitted). But Perry suggests no alternative method by which the popular branches can exercise the same type of
this provision, Congress is expressly authorized to make legisla-
tive "exceptions" to the Supreme Court's appellate jurisdiction,
thereby controlling the Supreme Court's constitutional agenda
by regulating the types of cases and issues the Court can de-
cide.\textsuperscript{245} I likewise agree with Perry that the much-discussed
theoretical limitations on this congressional power\textsuperscript{246} do not ap-
ply to nonoriginalist review. As Perry observes, "no value judg-
ment constitutionalized by the framers forbids Congress to use
its jurisdiction-limiting power as a means of exerting control
over the constitutional-policymaking activities of the federal ju-
diciary," and no other justification would support the Supreme
Court in any attempt to invalidate legislation restricting only
the Court's opportunity to exercise nonoriginalist review.\textsuperscript{247}

meaningful control over the Supreme Court. It appears that Perry's new essay
simply reflects a lesser concern for the principle of majoritarian consent.

245. What I say of the exceptions clause applies as well to Congress's
power to control the jurisdiction of the lower federal courts. See supra note
89.

246. Scholars have suggested at least three potential limitations on the
power of Congress to control the Supreme Court's jurisdiction. First, there is
general agreement that jurisdictional legislation is invalid if it directly violates
specific constitutional prohibitions, such as those found in the Bill of Rights.
Second, based in part on the Supreme Court's decision in United States v.
Klein, 80 U.S. (13 Wall.) 128 (1872), some commentators contend that Congress
can only control the general classes of cases that come before the Court and
cannot use selective jurisdictional legislation in an attempt to influence sub-
stantive constitutional doctrine. Finally, Professor Henry Hart has argued
that Congress cannot restrict jurisdiction to the point that it destroys "the es-
sential role of the Supreme Court in the constitutional plan." See Hart, The
Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in
Dialectic, 66 HARV. L. REV. 1362, 1365 (1953). See generally J. NOWAK, R. RO-
TUNDA & J. YOUNG, supra note 167, at 43-52; C. WRIGHT, THE LAW OF FEDERAL
COURTS 32-39 (4th ed. 1983); Gunther, Congressional Power to Curtail Federal
Court Jurisdiction: An Opinionated Guide to the Ongoing Debate, 35 STAN. L.
REV. 895 (1984); Sager, supra note 138. For a recent article flush with impor-
tant new ideas concerning the original understanding of article III, see Clin-
ton, supra note 138.

247. See M. PERRY, supra note 2, at 128; see also id. at 128-33. I agree with
Perry that, in theory, Congress's authority to restrict the Supreme Court's
originalist function might not be plenary. See id. at 129-30; see also supra note
246. The sorts of constitutional decisions that would trigger a public outcry
leading to jurisdiction-limiting legislation, however, would almost certainly be
nonoriginalist in character. Thus, the problem of distinguishing originalist
from nonoriginalist review for the purpose of testing the validity of jurisdic-
tional legislation is largely "imaginary." See M. PERRY, supra note 2, at 130;
see also infra text accompanying notes 248-51. But cf. M. Perry, supra note 25,
at — n.89 (contending that "as a practical matter" the authority of Congress
would have to cover originalist as well as nonoriginalist review).

Perry does accept one limitation on Congress's power to control non-
originalist review. Following conventional wisdom, Perry assumes that Con-
More important than the theoretical legal issues surrounding the exceptions clause, however, are the political realities that govern the relationship between Congress and the Court. Given Congress's general reluctance to use the exceptions clause to counteract Supreme Court decision making, any jurisdiction-limiting enactment doubtless would follow only from a massive popular movement against the Court. In such a political environment, it is all but inconceivable that the Supreme Court could prevail in a direct confrontation with Congress could not impose jurisdictional restrictions on state courts mirroring any that might be imposed on the Supreme Court and the lower federal courts. See M. Perry, supra note 2, at 131. If this view is correct, then any congressional judgment disfavoring the exercise of nonoriginalist review under the federal constitution might not be given full effect, for state courts might continue to hear the disfavored constitutional challenges and might continue to honor the congressionally rejected Supreme Court precedents. See Ranii, Congress Warned by Top State Judges Not to Curb Jurisdiction of U.S. Courts, Nat'l J., Feb. 15, 1982, at 7, col. 1; Sager, supra note 138, at 40-41; see also Auerbach, supra note 5, at 160-63; Lupu, supra note 41, at 612-15. See generally M. Perry, supra note 2, at 131-32, 136 n.* (explaining why these problems do not fatally undercut the effectiveness of the congressional power).

I think Perry and the conventional wisdom are wrong. It is true that, in theory, Congress might not be permitted to restrict state courts in their exercise of originalist review under the federal constitution. Cf. Sager, supra note 138, at 41 n.70 (arguing that the removal of both state and federal jurisdiction to hear constitutional challenges would violate due process). But there is no reason why Congress, acting, for example, under the broad reach of its commerce power, could not adopt federal legislation, binding on state as well as federal courts, rejecting nonoriginalist review purportedly grounded on the federal constitution and rejecting any state-law policies to the contrary. Cf. The Moses Taylor, 71 U.S. (4 Wall.) 411, 429 (1867) (holding that Congress has the power to deprive state courts of jurisdiction by granting exclusive jurisdiction to federal courts "in all cases to which the judicial power of the United States extends"). See generally Wechsler, supra note 185 (arguing that the states are protected through the national political process). Moreover, because it is almost inconceivable that Congress would move to restrict jurisdiction in anything but a nonoriginalist context, any limitation on its authority over state-court originalist review is essentially beside the point.

248. As to why Congress has been (properly) reluctant, see supra text accompanying notes 137-45; see also infra text accompanying notes 269-71.

249. Senator Eastland has outlined the necessary circumstances:

[W]hen the people feel that justice is no longer certain, that their courts are breaking with precedent, and are tearing down the bulwarks of judicial continuity, they are rightly restless and apprehensive. But even under such circumstances, they are not likely to rise against the courts unless the judicial departure from settled conclusions adversely affects the rights of the people or endangers their liberties. In such an instance, the wrath of the people is cumulative, focusing itself first against the particular decisions which oppress them or threaten to denude them of their rights or endanger their safety; and then, inevitably, against the court itself.

America's most broadly based democratic institution.\textsuperscript{250} As a result, it is all but inconceivable that the Court would attempt to exercise jurisdiction in the face of a congressional command to abstain.\textsuperscript{251}

Moreover, the evidence suggests that Congress is well aware of its ultimate power over the Supreme Court. Although the legislative debates on jurisdictional proposals frequently include technical arguments concerning the legal scope of the exceptions clause,\textsuperscript{252} they also include numerous references to the undeniable congressional power to control the excesses of a Supreme Court gone astray.\textsuperscript{253} In arguing against a 1979 proposal to strip the Court of jurisdiction in school-prayer cases, for example, Senator Kennedy readily conceded Congress's power over the judiciary:

No one really questions that we in this body have the power effectively to destroy the judiciary. We could do that by curtailing or eliminating the authorization and appropriations for U.S. attorneys, for the Federal judges, for magistrates, for the court buildings, for all the mechanisms which permit our Federal system to function. No one denies that we have at least that power.

The question is, Mr. President, whether, by the exercise of that

\begin{footnotesize}
\textsuperscript{250} Cf. The Federalist No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961) (noting that "the judiciary is beyond comparison the weakest of the three departments of power"); The Federalist No. 51, at 350 (J. Madison) (J. Cooke ed. 1961) ("[I]t is not possible to give each department an equal power of self defence. In republican government the legislative authority, necessarily, predominates."). See generally A. Neier, Only Judgment: The Limits of Litigation in Social Change 237 (1982) (arguing that "the legitimacy of judicial policy-making power is validated by inherent judicial powerlessness").

\textsuperscript{251} As Justice Rehnquist has written:

The exercise of jurisdiction over a case which Congress has provided shall terminate before reaching this Court . . . is a serious matter. The imperative that other branches of Government obey our duly issued decrees is weakened whenever we decline, for whatever reason other than the exercise of our own constitutional duties, to adhere to the decrees of Congress and the Executive.


\textsuperscript{253} The political power of Congress is not self-legitimating; i.e., it is not necessarily legitimate for Congress to exercise the power that it has. See supra note 6. But the power of Congress, in itself, does tend to legitimate the Supreme Court's practice of nonoriginalist review by providing a means of accommodating that practice with the principle of majoritarian consent.
\end{footnotesize}
Indeed, those in Congress who question the constitutionality of jurisdictional legislation invariably combine legal arguments with policy arguments, suggesting that their legal doubts are not critical to their legislative positions.

If, as I contend, Congress knows of the Supreme Court's practice of nonoriginalist review and knows of its own power to reject that practice, Congress's failure to act suggests a representative majoritarian consent, or at least acquiescence, to the role that the Supreme Court claims for itself in American society. This consent, however, does not extend beyond the Supreme Court's decision making by reference to external sources of nonoriginalist constitutional norms, because the Court's congressional supporters have no reason to believe that the justices look to an internal source of decision. If, as Perry maintains, the Court is covertly basing its constitutional decisions on the justices' personal moral values, it is engaging in a grossly offensive form of intellectual dishonesty, deceiving Congress and the American people about a very basic aspect of our government. Without judicial candor concerning the Court's method of decision there can be no congressional knowledge. And without knowledge there can be no

254. 125 CONG. REC. S7631 (1979) (statement of Sen. Kennedy); see 128 CONG. REC. S2255 (daily ed. Mar. 17, 1982) (statement of Sen. East) ("One might question the prudence in certain situations of exercising [our article III] power, but the question of whether we have it or not certainly is not and could not be a debatable item."); 104 CONG. REC. S18679 (1958) (statement of Sen. Javits) ("Congress can deprive the Supreme Court of appellate jurisdiction; Congress has that power."); see also infra note 269.

255. See e.g., 128 CONG. REC. S10791 (daily ed. Aug. 18, 1982) (statement of Sen. Packwood) (after expressing legal doubts concerning Congress's authority: "But if we have the power, it is not wise policy . . . ."); id. at S6747 (daily ed. June 14, 1982) (statement of Sen. Moynihan) ("If the constitutionality of these jurisdiction-stripping bills is unclear, [it is clear] that they are a profoundly bad idea . . . ."); id. at S2245 (daily ed. Mar. 17, 1982) (statement of Sen. Mitchell) ("I believe that these bills are both unwise and unconstitutional."); id. at S1323 (daily ed. Mar. 2, 1982) (statement of Sen. Bumpers) ("I think what we are doing is wrong as a matter of constitutional law and as a matter of sound public policy."). Not surprisingly, supporters of the legislative attacks on the Supreme Court may be less concerned about the niceties of technical legal arguments. See, e.g., 104 CONG. REC. S18651 (1958) (statement of Sen. Butler) ("I, for one, am perfectly willing to send legislation to that Court today, if I can do it, and let them declare it unconstitutional; and then the people will rise up and demand that Congress be given back its inherent power to legislate.").

256. See supra text accompanying notes 186-243.
consent.257

Taking the Court at its word, however, the Court's nonoriginalist function more closely tracks my suggested model than the one advanced by Perry: it engages the Court in a search for national values that mark the developing moral progress of American society, values that come from beyond the justices' personal schemes of right and wrong. Congress is aware of the basic contours of this model and has the power to reject it, but has yet to act, suggesting at least some measure of majoritarian consent to the Supreme Court's nonoriginalist role. Such consent may resolve, or at least mitigate, the overriding problem of legitimacy that I have addressed in this Article.

This theory of congressional consent, of course, is far from perfect. There is but limited evidence of Congress's beliefs concerning the Supreme Court's practice of nonoriginalist review and concerning Congress's power to control that practice. Further, legislative inaction as the basis for a finding of consent is much less compelling than a positive affirmation of approval. The strength of this evidence of majoritarian consent, however, must be evaluated against the countermajoritarian dangers posed by the asserted model of nonoriginalist review. The model I have described is countermajoritarian; it takes the Supreme Court beyond originalism and provides the Court with a broad opportunity to invalidate majoritarian decisions. This model, however, also limits the Court to an external source of decisional norms, indeed, a source that is "majoritarian" in the sense that it derives from American values, albeit values that may conflict with the will of temporary or local majorities.258 Although the model therefore creates a tension with the principle of consent, it is a tension much less pronounced than, for example, that created by Perry's expansive judicial role. Accordingly, the evidence of congressional consent must only be persuasive enough to overcome the model's definite but limited countermajoritarian dangers. I believe that the evidence meets that burden.

257. Cf. C. BLACK, supra note 169, at 27 ("[O]ne question remains: Is this congressional entrustment of power to the Court the result of sham, of an induced illusion that there is serious meaning in the idea of 'decision according to law'? ").

258. See supra note 164 and accompanying text.
C. CONGRESS AS THE SUPREME COURT'S SILENT PARTNER: A DELICATE BALANCE OF MUTUAL RESTRAINT

The existence of a congressional power to silence the Supreme Court is essential to any constitutional theory that gives meaningful weight to the principle of majoritarian consent. It is, in the words of Professor Charles L. Black, "the rock on which rests the legitimacy of the judicial work in a democracy." On this much Perry and I agree. But we again part company in assessing the basis on which Congress should properly exercise its ultimate power over the Court.

The relationship between Congress and the Supreme Court is extraordinarily delicate. In modern times, Congress has permitted the Court to exercise the full measure of its nonoriginalist function, thereby granting the Court an uninhibited opportunity to further the cause of American moral growth. The uniform rejection by Congress of jurisdiction-limiting legislation has significance far beyond the particular subjects of the various proposals. By defeating these measures, Congress has preserved the stature and independence of the Supreme Court, has preserved inviolate the Court's role as the expositor of our nation's constitutional values. Indeed, the modern failure of jurisdiction-limiting legislation has itself become a vital feature on the American constitutional landscape, and the future enactment of even a single proposal might irreversibly alter the basic character of our constitutional system.

Because of the uniform rejection of jurisdictional legislation in the recent past, the success of any proposal in the future necessarily would carry a strong condemnation of the Supreme Court, an implicit if not explicit statement that the Court had egregiously erred—that the Court had acted so recklessly as to move outside the proper scope of its decisional authority. Such a statement would signal dramatic problems within the Supreme Court, and the Court's institutional stature would be forever weakened. Moreover, any single legislative

259. See Black, supra note 244, at 846. I thus agree that "those people are very badly mistaken who think they strengthen the position of the Court by arguing that its jurisdiction is outside congressional control." See id. at 847 (emphasis in original).
260. But see supra note 244.
261. Speaking in opposition to the Jenner-Butler bill, Senator Wiley stated: What the sponsors of this measure are saying is not that the Supreme Court has decided wrongly—which may or may not very well be true—but what the sponsors of this measure are, in effect, saying is that the Supreme Court as an institution is itself wrong and needs
success would break the pattern of uniform rejection and significantly decrease the burden for subsequent proponents of additional legislation. One step inevitably would lead to another, and that to a third.\textsuperscript{262} Indeed, I do not think it extravagant to suggest that a single congressional enactment might portend the eventual destruction of the Supreme Court's present role in American society.\textsuperscript{263} Accordingly, the need for congressional restraint cannot be overstated.\textsuperscript{264}

For Perry, however, the congressional power to control the Supreme Court's jurisdiction would invite Congress to monitor

\begin{quote}
therefore to be reduced to a zero, or near-zero, in the structure of our government.
\end{quote}

\textsuperscript{262} See 128 CONG. REC. S2227 (daily ed. Mar. 17, 1982) (statement of Sen. Mathias) ("Once you go down this road, once you take this route, there is no area of human endeavor that could not be reached by a simple act of Congress altering the jurisdiction of the Federal courts to control the outcome of cases."); id. at S2250 (statement of Sen. Levin) ("[T]hese bills . . . undermine the independence of the judicial branch and set a dangerous precedent which could lead to the eventual demise of our democratic form of government."); id. at S2251 (statement of Sen. Goldwater) ("What particularly troubles me about trying to override constitutional decisions of the Supreme Court by a simple bill is that I see no limit to the practice."); id. at S1047 (daily ed. Feb. 24, 1982) (statement of Sen. Baucus) ("If Congress decides to endorse this approach, the pressure to respond to a wider range of constitutional issues will grow. Every constituency that feels victimized by an adverse constitutional ruling will come running to Congress for a jurisdiction withdrawal bill.").

\textsuperscript{263} As Senator Moynihan has noted:

\begin{quote}
When you say that there are matters the Court may not consider, you say it is less than a court; much less a Supreme Court. You are saying the Court acts at the toleration and on the terms set by this body; that this body becomes the supreme arbiter of what may be judged and what may not.

At that point a profound constitutional transformation takes place, a constitutional transmutation. We are not thereafter the same Republic we have been.
\end{quote}

\textsuperscript{127} CONG. REC. S7237 (daily ed. July 8, 1981) (statement of Sen. Moynihan); cf. 128 CONG. REC. S2242 (daily ed. Mar. 17, 1982) (statement of Sen. Metzenbaum) (stating that jurisdictional bills would "change the concept of this Nation's government"); id. at S2253 (statement of Sen. Hart) ("The issue at stake is our basic constitutional structure.").

\textsuperscript{264} As Senator Dodd has explained:

\begin{quote}
The most important issue, I believe, in this debate is this very delicate relationship that exists among the executive, the legislative, and the judicial branches of Government. That debate is probably the most significant debate, because none of us here wants in any way to upset the delicate balance that, for the most part, has existed over these past 200 years.
\end{quote}

\textsuperscript{127} CONG. REC. S7260 (daily ed. July 8, 1981) (statement of Sen. Dodd); cf. 104 CONG. REC. S7848 (1958) (statement of Sen. Javits) ("Do we want to break down all [our] self-discipline because some of us—perhaps including myself—are dissatisfied with some Supreme Court decisions? Is it not our highest duty
the substantive propriety of the Court's individual-rights decisions on a continuing case-by-case basis.265 Although Perry believes that Congress would rarely exercise its power,266 such congressional restraint would be highly improbable if, as Perry suggests, the Court were to base its constitutional decisions on the justices' personal moral values.267 Indeed, I believe that any congressional oversight of the substantive content of the Court's particular decisions, decisions that are frequently controversial and unpopular, would eventually lead to the enactment of jurisdictional legislation, legislation carrying the seeds of a possible constitutional disaster.268

If Congress should not exercise its power under the exceptions clause to express its disagreement with particular decisions, under what circumstances should it exercise this power?269 Earlier I suggested an explanation for the absence of

in the exercise of self-discipline, in this real work of our Government, to stand by these fundamental institutions?"").

Another factor might also counsel legislative restraint: if Congress chose to adopt jurisdictional legislation that left state-court jurisdiction intact, the state courts might continue to exercise the disfavored nonoriginalist review, raising potential problems concerning the continuing effect of federal constitutional precedents in the state courts and concerning the uniformity of this "federal" law. See generally supra note 247.

265. See M. PERRY, supra note 2, at 133 (referring to jurisdictional legislation as a way of "undoing particular constitutional policies established by the federal judiciary," "a way of dealing with . . . unpopular Supreme Court decision[s]"); see also id. at 220 n.181 (suggesting that congressional oversight might be considered "a form of extraordinary appellate review") (quoting Hazard, The Supreme Court as a Legislature, 64 CORNELL L. REV. 1, 16 (1978)).

266. See M. PERRY, supra note 2, at 132, 134.

267. See supra text accompanying notes 137-50.

268. Cf. 104 CONG. REC. S18683 (1958) (statement of Sen. Wiley) ("Let us not . . . kill the principle of the Supreme Court because we differ, even bitterly, with some of the decisions of the present Justices.").

269. By suggesting that Congress should limit its use of the exceptions clause, I do not mean to imply any limitation on the power of Congress to use that clause in response to nonoriginalist decisions. Rather, I am suggesting that it would be imprudent for Congress to exercise its power except under the conditions that I discuss in the text:

[W]hat is permissible is not always wise. Simply because we can do it does not mean that we should. Simply because we have the power does not mean that it is good for our Nation. Congress must resist temptation to adjust the jurisdiction of the lower Federal courts, or of all Federal courts, to respond to particular decisions of the Supreme Court.

128 CONG. REC. S10857 (daily ed. Aug. 19, 1982) (statement of Sen. Leahy); see also id. (statement of Sen. Leahy) (noting that "it would be a tragedy for Congress to forego the self-restraint that has united each generation with the next"); id. at S1041 (daily ed. Feb. 24, 1982) (statement of Sen. Goldwater) ("Whether or not Congress possesses the power of curbing judicial authority,
any modern jurisdiction-limiting legislation. That discussion is equally pertinent here:

Most members of Congress, like their constituents, believe that the Supreme Court has a special role in deciding constitutional cases, such that the Court's decisions concerning individual rights ought not to be disturbed by the majoritarian process. They respect the Supreme Court as a court of law, a court that they perceive to make principled constitutional decisions through traditional legal reasoning and analysis. To be sure, most members of Congress must recognize that the Court engages in nonoriginalist review by referring to norms beyond those supplied by the framers. The Court can engage in such review without losing congressional respect, however, as long as the norms to which it refers derive from sources perceived as appropriate for constitutional decision making.270

This explanation of past congressional inaction also suggests the basis on which Congress should use its exceptions-clause power. Because of the Supreme Court's important function in constitutional cases and the probable crippling effect of jurisdictional legislation, Congress should demand a strong justification before adopting such legislation. In particular, congressional dissatisfaction with the substantive results of any one or more constitutional decisions should not be enough; instead, Congress should move against the Court only if it wishes to reject the method of the Court's decision-making process.271

I believe that Congress has accepted, and should continue to accept, a method of judicial review under which the Supreme Court draws decisional norms from the pattern of American moral development. Through this general acceptance of the process by which the Court renders its decisions, Congress clothes the countermajoritarian Supreme Court with a mantle of majoritarian legitimacy.272 By refusing to exercise its power

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270. See supra text accompanying notes 143-45.

271. Cf. 128 CONG. REC. S10854 (daily ed. Aug. 19, 1982) (statement of Sen. Packwood) ("Only if we are prepared to say that the Court has become intolerable in a fundamentally democratic society and that there is no prospect whatever for getting it to behave properly should we adopt a principle which contains within it the seeds of the destruction of the Court's entire constitutional role.") (quoting Professor Robert Bork).

272. Compare the argument of Professor Leonard W. Levy:

Long acquiescence by the people and their representatives has legitimated judicial review. It was "not imposed by self-anointed fiat on an unwilling people." Despite periodic and sometimes intense attacks on the Court by Congress or the White House, judicial review has survived unscathed for over a century and a half. Even the brief and unique encounter with Congress's controlling power over the Court's
under the exceptions clause, Congress thus acts in a unique partnership with the Supreme Court, a partnership that permits a democratic society to reach beyond its majoritarian values without forsaking its ultimate commitment to those values.

But the partnership has two partners. In return for legislative restraint, the Supreme Court must retain the respect of Congress. The Court must engage in a process of legal analysis worthy of the highest judicial institution in America. In the exercise of nonoriginalist judicial review, the Court must ground its decisions on norms that come from beyond the justices themselves, that come from external indicia of the national moral values that are extant or emerging in our society. The Court must also recognize the limits of its competence; it should be reluctant to disturb the policy decisions reached by majoritarian institutions unless it is confident that those decisions conflict with contemporary national values or with an evident pattern of developing American thought. Most important, the Court must be candid in its opinions, describing the norms that it is invoking and the source from which those norms have been drawn. If Congress or the American people were ever to view the Court's reasoning as amounting to nothing more than an elaborate constitutional charade, the death of the Court's vital function would not be far behind.

Unlike Professor Perry, I call not for a "fierce" judicial activism, but rather for a cautious, restrained judicial role that recognizes its countermajoritarian dangers as well as the fundamental benefits that might result from its exercise. I also call for equal caution and restraint from Congress, the majoritarian institution that has the power to derail the Court's nonoriginalist mission. In the end, the future of judicial review de-
pends upon a unique combination of judicial and congressional wisdom. The Supreme Court can further the cause of moral growth through the exercise of nonoriginalist review, but it likewise can lose all that has been gained by stepping beyond the bounds of its tenuous congressional license.274 For its part, Congress can either join as a silent partner in the Supreme Court's endeavor or it can disable the Court beyond repair by exercising its dormant power to control the Court's jurisdiction.

CONCLUSION

In this Article, I have examined the strengths and weaknesses of Professor Perry's constitutional theory and have attempted to build on Perry's work by suggesting an alternative model of nonoriginalist review. The model I have proposed contemplates a more restricted version of review than does Perry's and a more limited congressional oversight of the Supreme Court's constitutional decision making. As such, it cautions restraint on the part of both governmental branches, a mutual restraint through which the practice of nonoriginalist review can be permitted to continue its important function in our society.275

To date, the Supreme Court and Congress have exercised the necessary restraint, thereby perpetuating the uniquely American constitutional experience:

[T]he American Republic, alone among democracies in modern or ancient times, created and continued an independent judicial branch of government. By and large this independence—an independence of

274. Some would contend that the Court has already gone too far, pushing Congress to the brink of exercising its jurisdiction-limiting power. See Cohodas, supra note 235, at 947 ("The Supreme Court brought this on itself. It's the abuse of power of judicial review. . . . The court has been eroding the deliberative process of Congress. They've precipitated the crisis.") (quoting Sen. East); Ervin, supra note 40, at 1536 ("Members of Congress who revere the Constitution are likely to demand that this power be exercised with frequency in the future if activist Supreme Court justices do not stop substituting their personal notions for constitutional precepts, while pretending to interpret the Constitution."); Marcus, supra note 40, at 24 ("If the court is going to get into the game of legislating—which is in effect what it is doing in decisions like these—it should not be surprised if Congress slaps it back.") (quoting Carl Anderson, aide to Sen. Helms).

275. Given the overriding importance of the issue I have addressed in this Article, I will consider my work a success if I have contributed in even a small way to an understanding of that issue and how it might properly be resolved. The legitimacy of nonoriginalist review is an issue so fundamental that it cannot be given too much attention. The debate should continue, and I have no doubt that it will.
custom, tradition, and mutual restraint as much as of law—has served our country well over the past two centuries.

I believe that we weaken this proud tradition at our peril.276 Those who support nonoriginalist judicial review can do no better than to work for a continuation of the mutual restraint that now prevails.277 We can hope for nothing more.


Underlying the success of the system over nearly 200 years, is a strong notion of comity and accommodation among the branches. The self-restraint exercised by each branch is strengthened by genuine concern about destroying that sense of comity, just as one is careful to nurture a fruitful relationship with a good neighbor.

277. As Senator Wiley has observed: "What we must in our time depend upon, and what without a shadow of a doubt the Founding Fathers expected we would depend upon, is the moral sense of the legislators, the moral sense of the Supreme Court itself, the American genius for compromise without friction." 104 CONG. REC. S18683 (1958) (statement of Sen. Wiley).