ARTICLES

Nonoriginalist Constitutional Rights and the Problem of Judicial Finality

By DANIEL O. CONKLE*

> [N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation . . .
>
> —Thomas Jefferson[1]

In a nation generally committed to the principle of majoritarian government, the institution of judicial review stands as a stark exception, one that permits the electorally unaccountable Supreme Court to countermand majoritarian decisions by finding them inconsistent with overriding constitutional values. When the Court recognizes an *originalist* constitutional right—a right placed beyond the reach of majorities by the constitutional framers[2]—the Court's function, though countermajoritarian, is not especially controversial. Virtually all of the constitutional rights recognized by the modern Supreme Court, however, are *nonoriginalist* in derivation; that is, they depend at least to some extent on norms not provided by the framers, but drawn instead from some other source of values.[3]

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* Assistant Professor of Law, Indiana University School of Law—Bloomington. Professors Craig M. Bradley, Erwin Chemerinsky, Bryant G. Garth, Maurice J. Holland, Ira C. Lupu, Earl M. Maltz, and Michael J. Perry each provided valuable comments on an earlier version of this essay. I also received helpful input from a number of other colleagues who were part of a summer research group. I am grateful to all these persons. Finally, I wish to thank Maureen Straub Kordesh for her research assistance, and Indiana University and its School of Law for the financial support that they provided for this work.

1. Letter from Thomas Jefferson to James Madison (September 6, 1789), *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 488, 491 (A. Koch & W. Peden ed. 1944).

2. As used in this Article, the term "framers" embraces not only the officials who voted to propose the original Constitution and its various amendments, but also the officials who voted in favor of ratification.

3. As Dean Terrance Sandalow has noted, "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

No issue of constitutional theory is more fundamental than the legitimacy of the Supreme Court's recognition of nonoriginalist constitutional rights.[4] This issue has consumed the academic community, and the literature is awash with contributions to the ongoing debate.[5] I have participated in that scholarly conversation,[6] and applaud its continuation, for the questions of political theory addressed in the debate are of compelling importance in our system of constitutional democracy.

Those who defend nonoriginalist judicial review have offered a variety of theoretical justifications for the practice.[7] Considerably less attention, however, has been devoted to the doctrinal implications of these various theories. Yet the same theoretical arguments that may serve to justify nonoriginalist review may also suggest the need for important modifications in the Supreme Court's constitutional doctrine. Thus, contrary to the suggestions of some,[8] the scholarly debate concerning non-

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Constitution, even on the most generous interpretation of that notion." Sandalow, *Constitutional Interpretation,* 79 MICH. L. REV. 1033, 1061 (1981). Professor Michael J. Perry likewise 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. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY 91 (1982). This is not to say, however, that the Supreme Court readily admits the predominance of nonoriginalist review. *See generally infra* note 173 and accompanying text.

4. My focus in this Article is on constitutional doctrine relating to individual rights, doctrine typically derived from the Bill of Rights or the Fourteenth Amendment. I am concerned with federal, not state, constitutional law, and especially with the role of the United States Supreme Court in the formulation of that law.

5. No fewer than four recent law review symposia relate to this subject: *Constitutional Adjudication and Democratic Theory,* 56 N.Y.U. L. REV. 259 (1981); *Judicial Review versus Democracy,* 42 OHIO ST. L.J. 1 (1981); *Constitutional Interpretation,* 58 S. CAL. L. REV. 551 (1985); *Judicial Review and the Constitution—The Text and Beyond,* 8 U. DAYTON L. REV. 443 (1983). Individual contributions to the debate include several recent books. *See, e.g.,* J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY (1984); P. BOBBITT, CONSTITUTIONAL FATE (1982); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980), J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); M. PERRY, *supra* note 3.

6. *See* Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond,* 69 MINN. L. REV. 587 (1985).

7. *See, e.g.,* M. PERRY, *supra* note 3; Sandalow, *supra* note 3; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83 YALE L.J. 221 (1973). *Cf.* J. ELY, *supra* note 5 (defending a broad form of judicial review but attempting to justify that review by reference to the framers' intentions).

8. *See, e.g.,* Lupu, *Constitutional Theory and the Search for the Workable Premise,* 8 U. DAYTON L. REV. 579, 580 (1983) ("Tied to a set of academic models and rubrics, detached from the law's flow, constitutional scholarship is at risk of irrelevance to its objective concerns and to other bodies of law and legal scholarship."); Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective,* 44 OHIO ST. L.J. 93, 93 (1983) ("What has intrigued me the most about the debate . . . is its utterly academic nature.").

originalist review is, or at least ought to be, much more than an academic exercise, for the manner in which the debate is resolved in turn may demand significant changes in the nature of judicial review itself.[9]

In this Article, I shall discuss a theory of nonoriginalist judicial review and the implications of that theory for a basic and well-established feature of judicial review—the finality of the Supreme Court's constitutional rulings. The theory justifies nonoriginalist review as a practice that furthers the moral development of our society through the constitutionalization of contemporary and emerging national values, and that, in addition, serves the independently significant function of nationalizing our governmental policies concerning controversial individual rights. The implications of this theory suggest that the doctrine of judicial finality should be abandoned for certain types of constitutional rulings.

I. The Problem of Judicial Finality in the Adjudication of Constitutional Rights

In the landmark case of *Marbury v. Madison,*[10] the Supreme Court first claimed for itself the power of judicial review—the power to deter-

9. *Cf.* Saphire, *Gay Rights and the Constitution: An Essay on Constitutional Theory, Practice, and* Dronenburg v. Zech, 10 U. DAYTON L. REV. 767, 811 (1985) ("[T]he shape and direction of constitutional doctrine is often importantly, indeed profoundly, influenced by one's underlying conception of the nature of the Constitution and the legitimate role and scope of judicial review.").

Those theories demanding the most drastic changes in the practice of judicial review are not nonoriginalist theories at all, but rather are theories suggesting that the Supreme Court's proper function is limited to *originalist* constitutional decisionmaking. *See, e.g.,* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1 (1971); Monaghan, *Our Perfect Constitution,* 56 N.Y.U. L. REV. 353 (1981); Rehnquist, *The Notion of a Living Constitution,* 54 TEX. L. REV. 693 (1976). These originalist theories are radical in the sense that they would render illegitimate a substantial portion of the Supreme Court's contemporary constitutional doctrine. *See supra* note 3 and accompanying text.

Another novel theory that might demand significant doctrinal changes is that recently proposed by Professor Bruce A. Ackerman. Ackerman would give binding constitutional effect not only to the original Constitution and its formal amendments, but also to certain other strong statements of public sentiment, such as those accompanying the shifts in constitutional doctrine that occurred in the New Deal era. *See* Ackerman, *The Storrs Lectures: Discovering the Constitution,* 93 YALE L.J. 1013 (1984). Ackerman suggests that his "dualist" theory "will require nothing less than a dualist reinterpretation of every significant event in our constitutional history—from the American Revolution to Watergate, from *Marbury* to *Roe.*" *Id.* at 1071. Unfortunately, however, Ackerman makes no effort to evaluate, in light of his theory, any of the modern Supreme Court's expansive doctrine protecting individual rights. For a critique of Ackerman's basic argument, see Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change,* 1984 U. ILL. L. REV. 933, 951 n.51. *See also* Levinson, *What Do Lawyers Know (And What Do They Do With Their Knowledge)? Comments on Schauer and Moore,* 58 S. CAL. L. REV. 441, 451 n.45 (1985).

10. 5 U.S. (1 Cranch) 137 (1803).

mine the meaning of the Constitution[11] when governmental actions are challenged on constitutional grounds. Although *Marbury* itself arguably left open a number of questions concerning the effect of the Supreme Court's constitutional opinions,[12] the modern Court takes an exceedingly broad view of its interpretive role. Thus, the Court does not view its interpretations of the Constitution as binding only in the particular cases in which they are announced, nor does it expect executive or legislative officials to reevaluate for themselves the validity of the Court's constitutional rulings. Instead, the Court considers its interpretations to be final and determinative statements of general law, reversible only by constitutional amendment or by the Court's own subsequent change of opinion.[13] The Supreme Court essentially equates its rulings with the Constitution itself, and the Court's opinions thus represent the "supreme Law of the Land."[14]

This is not to suggest that the political branches should or do refrain from considering questions of constitutional interpretation. They may evaluate constitutional issues not yet decided by the Court,[15] and they

11. The proper meaning of "the Constitution," of course, depends on a theory of what "the Constitution" means. *See generally infra* Parts I.A. & I.B. (discussing originalist and nonoriginalist constitutional decisionmaking).

12. For a general discussion and analysis of *Marbury,* see Van Alstyne, *A Critical Guide to Marbury v. Madison,* 1969 DUKE L.J. 1.

13. For a discussion of the tension between the doctrine of Supreme Court finality and the notion that the Justices are constrained to follow certain rules or standards in the decision of constitutional cases, see Valauri, *Constitutional Theodicy: The Antimony of Finality and Fallibility in Judicial Review,* 29 ST. LOUIS U. L.J. 245 (1985).

14. Perhaps the most explicit Supreme Court statement of this position appears in Cooper v. Aaron, 358 U.S. 1, 17-18 (1958):

> [W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in [Brown v. Board of Education, 347 U.S. 483 (1954)]. It is necessary only to recall some basic constitutional propositions which are settled doctrine.
>
> Article VI of the Constitution makes the Constitution the "Supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of Marbury v. Madison [5 U.S. (1 Cranch) at 177] that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown Case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect . . . .

15. Mayor Donald Fraser of Minneapolis, for example, recently vetoed a controversial ordinance regulating pornography based on his belief that it violated the First Amendment. *See* Bryden, *Between Two Constitutions: Feminism and Pornography,* 2 CONST. COMMENTARY 147, 149, 172-73 (1985). For conflicting views concerning the propriety of the mayor's constitutionally based veto, *compare* Letter from Lawrence Tribe to Alice Rainville, President of the Minneapolis City Council (Jan. 8, 1984) (arguing that the mayor "usurped the judicial func-

may express their disagreement with decisions that the Court has reached.[16] But the opinions of elected officials on issues yet to be adjudicated are not binding on the Court,[17] and any disagreement with the Court on decided questions has no legal effect.[18]

This doctrine of judicial finality, which gives the Supreme Court the final, authoritative word on questions of constitutional interpretation, raises important issues of political theory. Indeed, the existence of this doctrine, and the polity's acquiescence to it,[19] seem quite out of character for a society that generally governs itself through elected representatives. The Supreme Court, an unelected body of life-tenured judges, is permitted not only to decide the meaning of constitutional rights, but to make these decisions final and conclusive on the political branches of government.[20] Thus, through the recognition of constitutional rights, the

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tion"), *reprinted in* Bryden, *supra,* at 180 *with* Levinson, *supra* note 9, at 453-54 & n.52 (characterizing Tribe's position as "remarkable").

16. *See generally* G. GUNTHER, CONSTITUTIONAL LAW 21-29 (11th ed. 1985) (discussing the authoritativeness of the Supreme Court's constitutional interpretations and the role of legislative and executive officials in considering constitutional questions).

17. In some few cases, the Supreme Court does construe the Constitution to leave certain constitutional questions to the popular branches. *See* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 109-20 (2d ed. 1983) (discussing the "political question" doctrine).

18. It is not entirely true that majoritarian officials are powerless to implement their own constitutional opinions on questions already decided differently by the Supreme Court. In particular, although they cannot implement a *broader* view of their constitutional power than that recognized by the Court, they can take a *more restricted* view, and, based on their own conceptions of the Constitution, *refrain* from taking actions that the Court has previously upheld as valid. Thus, for example, President Andrew Jackson vetoed a bill to recharter the Bank of the United States because he thought it unconstitutional, even though McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), had already upheld the constitutionality of the bank. *See* G. GUNTHER, *supra* note 16, at 22-23. Likewise, in the context of individual rights, legislative and executive officials may envision a larger field of constitutionally protected individual liberty than that recognized by the Court, and may refuse—for constitutional reasons—to take action that the Court has upheld as constitutionally permissible. To this extent, then, majoritarian disagreement with the Court may have direct legal consequences, albeit consequences resulting not from affirmative governmental action, but rather from the government's refusal.to act. *Cf.* Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation,* 27 STAN. L. REV. 585 (1975) (arguing that legislators should consider the constitutionality of proposed legislation and refrain from unconstitutional enactments).

19. As Professor Paul Brest has observed, "The belief in judicial exclusivity is so widespread that it is usually assumed rather than argued for. Most citizens, politicians, and scholars seem to agree with or acquiesce in the Supreme Court's claim to be the ultimate interpreter of the Constitution." Brest, *Who Decides?,* 58 S. CAL. L. REV. 661, 670 (1985).

20. John Agresto has drawn an important distinction:

> It should be emphasized that the doctrine of judicial finality is conceptually quite distinct from the doctrine of judicial review, although our immediate reaction is to equate them. The doctrine of finality concerns the question of whether the opinions of the judiciary (or of any branch) are finally and authoritatively determinative of constitutionality. The power of judicial review may . . . or may not . . . imply that such judicial decisions are authoritative, final, and binding on all branches.

Supreme Court may defeat majoritarian policies, giving effect instead to the Court's own judgment concerning the meaning of the Constitution. And, absent the extraordinary step of constitutional amendment,[21] the polity is legally powerless to reverse the Court's decisions.[22]

A. Originalist Judicial Review

Although the doctrine of judicial finality may thus seem out of place in our governmental system, it is not especially troubling in the context of *originalist* constitutional decisionmaking for three related reasons. First, in the exercise of originalist judicial review, the Supreme Court undertakes an exclusively historical inquiry, attempting to ascertain precisely what constitutional rights the framers of the Constitution intended to protect.[23] Being historical in derivation, this group of rights is con-

Agresto, *The Limits of Judicial Supremacy: A Proposal for "Checked Activism"*, 14 GA. L. REV. 471, 473 n.15 (1980). Although Canada's new constitution, for example, authorizes judicial review, it generally permits Parliament and the provincial legislatures to override judicially protected constitutional rights. *See* CHARTER OF RIGHTS AND FREEDOMS §§ 24(1), 33.

21. A constitutional amendment, of course, changes the language of the Constitution. Accordingly, even if the opponents of an unpopular Supreme Court decision were able to effect the passage of an amendment to "reverse" that decision, the amendment would not directly repudiate the soundness of the Court's constitutional ruling. To be sure, the Constitution would have a different meaning after the adoption of the amendment, but only because its text had been revised. The Court's reading of the Constitution's *prior* language, although now of historic interest only, would remain authoritative.

22. The majoritarian branches of the federal government do possess certain legal powers that might be utilized in attempts to influence the Court's constitutional decisions, including the powers to appoint and to impeach justices and to control the Court's budget and jurisdiction. However powerful these devices might be for other purposes, however, none of them provides an effective means for countermanding a specific Supreme Court decision, at least not without also having much broader ramifications for the Court and its governmental role. *See* J. CHOPER, *supra* note 5, at 49-52 (noting that the appointment, impeachment, and budgetary powers of the political branches are ineffective in controlling the Supreme Court's constitutional decisionmaking); J. ELY, *supra* note 5, at 46-47 (same); Conkle, *supra* note 6, at 653-60 (arguing that Congress has a broad power to adopt legislation controlling the Supreme Court's appellate jurisdiction, but that the enactment of any such legislation would have dramatic consequences for the Court's role in American government).

23. The Court encounters numerous difficulties in its quest for the framers' intentions. *See* Saphire, *Judicial Review in the Name of the Constitution,* 8 U. DAYTON L. REV. 745, 772-78 (1983). Indeed, a number of scholars have suggested that an exclusively historical inquiry is not possible, and that originalism therefore is not a practical alternative. *See, e.g.,* Bennett, *The Mission of Moral Reasoning in Constitutional Law,* 58 S. CAL. L. REV. 647, 648-55 (1985); Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U.L. REV. 204, 221-22 (1980); Chevigny, *Why the Continental Disputes Are Important: A Comment on Hoy and Garet,* 58 S. CAL. L. REV. 199, 206 (1985); Dworkin, *The Forum of Principle,* 56 N.Y.U. L. REV. 469, 471-500 (1981); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781, 793-804 (1983). Other scholars contend, to the contrary, that originalism *is* a real option for judges. *See, e.g.,* Monaghan, *supra* note 9, at 377; Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551, 597-602 (1985) (appendix to article). In any event,

stant and unchanging.[24] Thus, once an issue of originalist constitutional interpretation has been correctly decided, it has been correctly decided for all time.[25] Second, calling as it does for the analysis of written materials and the determination of legal intentions, the Court's originalist function closely approximates traditional statutory interpretation.[26] Thus originalist review requires the Court to analyze the text of an enactment and its legislative history, and, with the aid of judicially developed rules for determining legal intentions, to decide what the relevant provision was intended to mean by the officials responsible for its adoption.[27] Judges, especially at the appellate level, are trained and experienced in this type of decisionmaking process. As a result, the highest appellate court in the United States is well suited for the task of originalist review; if any institution of American government is capable of determining the

originalism as a *theory* of constitutional adjudication demands that the Court search for the framers' intentions and nothing more. *See infra* note 40.

24. There is no persuasive evidence that the framers "intended the judiciary to develop new individual rights, which correspondingly create new disabilities for democratic government." *See* Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U.L.Q. 695, 697. On the other hand, originalism does not necessarily preclude an application of the framers' intentions to circumstances they could not have foreseen. *See* Conkle, *supra* note 6, at 599 n.43 (discussing the possibility of originalist invalidation of modern analogues of practices the framers intended to proscribe). *See generally* Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation,* 58 S. CAL. L. REV. 603, 608 (1985) (noting that originalism rests on a belief "that the provisions of the Constitution should mean throughout history whatever they meant in the 'original understanding' ").

25. *Cf.* Wallace v. Jaffree, 105 S. Ct. 2479, 2520 (1985) (Rehnquist, J., dissenting) ("As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter. . . .").

26. The proper judicial role in statutory interpretation is itself an extremely complex and controversial matter. *See, e.g.,* W. Popkin, The Collaborative Model of Statutory Interpretation (1984) (urging a model of statutory interpretation that would engage courts in a process of dialogue with the legislature) (unpublished manuscript). By referring to "*traditional* statutory interpretation," I mean to describe a judicial function in which a court seeks to discover what a statutory enactment was intended to mean by the legislature responsible for its adoption. I do not mean to suggest that this view of statutory interpretation is either normatively appealing or descriptively accurate in all cases.

27. Professor H. Jefferson Powell has conducted important historical research suggesting the modern rules for determining legal intentions—including especially those that support a focus on the proceedings and individual intentions of those who assembled in Philadelphia—may depart from the rules that the framers themselves might have anticipated when they proposed and ratified the original Constitution. *See* Powell, *The Original Understanding of Original Intent,* 98 HARV. L. REV. 885 (1985). Powell also concludes, however, that "intentionalism in the modern sense" prevailed by the time of the Civil War, *see id.* at 947, and therefore in time to guide the drafters and ratifiers of what has become the constitutional limitation on governmental power most frequently invoked by the Supreme Court—the Fourteenth Amendment. *See generally infra* text accompanying notes 160-162.

original meaning of the Constitution, surely it is the Supreme Court.[28]

A third reason for giving the Court the final word in defining originalist constitutional rights is to ensure an honest and disinterested determination of the framers' intentions. The recognition of constitutional rights serves to constrain majoritarian policymaking and to limit the power of elected officials. If these constraints are to be effective, the task of enforcement must be entrusted to officials who are detached from majoritarian pressures and have no direct stake in the outcome. The majoritarian branches simply cannot be left with the task of deciding for themselves what limits the framers imposed on their exercise of power; that task better falls on the Supreme Court, a body with the political independence necessary for performing a distinctly countermajoritarian function.

The countermajoritarian nature of originalist judicial review cannot be doubted, for the recognition of originalist constitutional rights works to frustrate majoritarian policymaking.[29] The extent of this intrusion on majoritarian government, however, should not be overstated. The Supreme Court is authorized to recognize only a limited set of unchanging constitutional rights, and the determination of those rights would appear to lie squarely within the Court's institutional competence.

In *Marbury v. Madison,* Chief Justice Marshall declared that "[i]t is emphatically the province and duty of the judicial department" to determine the meaning of the Constitution,[30] and that the Constitution is "a superior paramount law, unchangeable by ordinary means, . . . [not] alterable when the legislature shall please to alter it."[31] If Marshall thus recognized a doctrine of judicial finality, however, he did so in light of an originalist conception of the Constitution, at least as to constitutional *limitations* on governmental action.[32] As examples of protected constitu-

28. Mine is a claim of comparative *institutional* competence, comparing the competence of the judiciary in general and the Supreme Court in particular to the competence of the legislative and executive branches. I make no claim, for example, that the Supreme Court is more competent in this task than accomplished legal historians. For a sophisticated and carefully reasoned argument favoring a comparative institutional approach to constitutional law, see Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis,* 51 U. CHI. L. REV. 366 (1984).

29. *See* Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review,* 62 TEX. L. REV. 1207, 1209 (1984) (noting that "*any* judicial decision that overturns a policy enacted by a popularly elected legislature is antimajoritarian") (emphasis in original).

30. 5 U.S. (1 Cranch) 137, 177 (1803).

31. *Id.*

32. Chief Justice Marshall later gave a broad interpretation to the power-*granting* provisions of the Constitution, which he construed to permit the elected national government to respond flexibly to changing times and conditions. *See* McCulloch v. Maryland, 17 U.S. (4

tional rights, Marshall cited the prohibition on bills of attainder and ex post facto laws, as well as the evidentiary requirements for proving treason:

> The constitution declares that 'no bill of attainder or *ex post facto* law shall be passed.'
>
> If, however, such a bill should be passed, and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
>
> 'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'
>
> . . . If the legislature should change that rule, and declare one witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?[33]

Marshall recognized a judicial right and duty only to identify and protect constitutional principles that were "designed to be permanent."[34] Indeed, given his examples, Marshall might well have been limiting the judicial protection of constitutional rights to cases in which majoritarian officials had clearly and obviously violated the intended meaning of a constitutional provision.[35]

Needless to say, originalist interpretation is not always so easy.[36] To interpret the vaguely worded Fourteenth Amendment,[37] for example, the Court must look beneath the text to the historical reasons for its adoption. Through its analysis, the Court might conclude, for example, that the framers of the amendment intended to protect certain civil rights for the newly freed slaves and to ensure the constitutional validity of the

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Wheat.) 316, 407 (1819) ("[W]e must never forget, that it is a *constitution* we are expounding.") (emphasis in original). *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). To say that the power of majoritarian officials should be construed broadly, of course, hardly supports a "broad" reading of the power-*limiting* provisions of the Constitution, for such a reading works to frustrate, not facilitate, the operation of majoritarian government. *See* M. Perry, *supra* note 3, at 33-35.

In cases following *Marbury,* Marshall also made decisions suggesting that his respect for majoritarian policymaking differed with the level of government responsible for the policy under attack. Thus, state laws were treated less deferentially than federal ones. *See* Van Alstyne, *Interpreting* This *Constitution: The Unhelpful Contributions of Special Theories of Judicial Review,* 35 U. FLA. L. REV. 209, 213 (1983).

33. Marbury v. Madison, 5 U.S. (1 Cranch) at 179.

34. *Id.* at 176.

35. *Cf.* Grey, *The Constitution as Scripture,* 37 STAN. L. REV. 1, 14-15 (1984) (noting Marshall's emphasis on the *written* constitutional limitations on governmental power).

36. *See supra* note 23.

37. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Civil Rights Act of 1866.[38] Although based on a much more tenuous historical record, the Court might also conclude that the Fourteenth Amendment was intended to make the Bill of Rights apply to state as well as federal action.[39] Regardless of the difficulty of its inquiry or the accuracy of its conclusion, however, the Court's basic function in originalist judicial review is always to determine the intentions of the constitutional framers and to ensure that those intentions are protected "permanently" against majoritarian transgression.[40]

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38. *See* R. BERGER, *supra* note 9.

39. Justice Black's prominent defense of this historical position appears in his dissenting opinion in Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting). Black found that

> [the historical record] conclusively demonstrates that the language of the first section of the Fourteenth Amendment, taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights.

Id. at 74-75. Contrary to Black's position, the prevailing approach on the Supreme Court uses the Fourteenth Amendment as authority only for *selectively* applying certain provisions of the Bill of Rights to the states. *See, e.g.,* Duncan v. Louisiana, 391 U.S. 145 (1968). Academic inquiries, however, have found little historical support either for Black's "total incorporation" position or for the "selective incorporation" doctrine embraced by the Court. *See, e.g.,* L. Levy, *The Fourteenth Amendment and the Bill of Rights,* in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 64 (1972); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding,* 2 STAN. L. REV. 5 (1949). *See also* Bond, *The Original Understanding of the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania,* 18 AKRON L. REV. 435, 464-65 (1985) (concluding that those who ratified the Fourteenth Amendment in Illinois, Ohio, and Pennsylvania plainly did not intend for the amendment to incorporate the Bill of Rights). *But cf.* Farber & Muench, *The Ideological Origins of the Fourteenth Amendment,* 1 CONST. COMMENTARY 235, 269-75 (1984) (suggesting that the framers of the Fourteenth Amendment intended to perfect the protection of fundamental rights already existing in natural law and probably intended to make the Bill of Rights applicable to state action); Maltz, *The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction,* 45 OHIO ST. L.J. 933 (1984) (arguing that the framers of the Fourteenth Amendment intended to make the Bill of Rights and certain other "civil rights" assertable against state action, but that they intended to exclude voting and other "political rights" from the scope of the amendment).

40. Originalist constitutional rights are not limited to rights expressly ordained by the constitutional text or its legislative history. They also include implied rights that fairly may be inferred from the historical circumstances surrounding the constitutional enactment or from the type of governmental structures the framers created. *See* Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703, 706 n.9 (1975). For example, a constitutional right to travel or migrate interstate free from undue governmental interference might be inferred from the framers' creation of a national polity. As Chief Justice Taney observed in the Passenger Cases:

> For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States.

48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting). *Cf.* Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("We have no occasion to ascribe the source of this right to travel interstate to

In the exercise of originalist judicial review, then, the Supreme Court seeks to discover an unchanging set of constitutional values; it is more competent than alternative governmental decisionmakers in the discovery of those values; and it is performing a necessary function in our constitutional democracy, but one that requires only a limited retreat from our fundamental commitment to majoritarian policymaking. These three factors combine to support the doctrine of judicial finality in the determination of originalist constitutional rights.

Originalist constitutional rights, however, represent no more than a tiny fraction of the constitutional rights recognized by the modern Supreme Court.[41] Thus, to conclude that the doctrine of judicial finality is defensible for originalist constitutional decisionmaking is significant only to the very limited extent that the Court engages in that type of judicial review. Far more important, and far more troubling, is the doctrine of judicial finality as applied to the Supreme Court's recognition of *nonoriginalist* constitutional rights.

B. Nonoriginalist Judicial Review

Nonoriginalist judicial review is a process that bears only faint resemblance to originalist review.[42] Originalist review engages the Court in a historical search for a closed set of unchanging values, those placed in the Constitution at the time of its adoption. Nonoriginalist review, on the other hand, does not depend on the fixed intentions of the framers. Rather than looking to the beliefs of those historical actors, the Court attempts to identify and give effect to important values linked in some other way with the American tradition.

There is no general agreement on the specific source or sources from which nonoriginalist values properly may be drawn. Nonetheless, most scholars at least agree that the search must be for values tied to our American political culture, including our *contemporary* political culture. Professor Ira C. Lupu, for example, has argued that constitutional rights properly may be recognized on the basis of values that have strong sup-

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a particular constitutional provision."). *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

Nevertheless, the originalist search is always for the framers' intentions, regardless of how those intentions might be derived. And when the framers' intentions have been exhausted, so too has the Court's originalist function, for the Court cannot recognize an originalist constitutional right based on considerations drawn from any other source. For an elaboration of the nature and limitations of originalist judicial review, see Conkle, *supra* note 6, at 591-601.

41. *See supra* note 3 and accompanying text.

42. *See* Brest, *supra* note 23, at 234 ("It is rather like having a remote ancestor who came over on the Mayflower.").

port not only in American history, but also in our present-day society.[43] Dean Harry H. Wellington has defended the constitutionalization of what he calls America's "contemporary morality,"[44] and Professor Michael J. Perry has expressed a similar opinion.[45] Numerous other scholars, in one way or another, also have recognized that nonoriginalist review must look to the present as much as the past.[46]

For purposes of evaluating the doctrine of judicial finality, nonoriginalist review differs markedly from originalist constitutional decisionmaking. By its very nature, nonoriginalist review depends on a set of societal values that has changed and continues to change over the course of our nation's history. As a result, the content of nonoriginalist constitutional rights is not fixed; it inevitably changes over time. Likewise, the process of identifying nonoriginalist rights does not depend on a determination of legal intentions embodied in historical documents. Instead, it rests on an evaluation of our American society and the values to which it clings. If the Constitution of our time protects a woman's right to abortion,[47] for example, it is not because the framers so provided, but rather because today's American culture in some way values that protection. If the Equal Protection Clause now calls for special judicial scrutiny of

43. *See* Lupu, *Untangling the Strands of the Fourteenth Amendment,* 77 MICH. L. REV. 981, 1040-41 (1979). For a similar argument, see *Developments in the Law—The Constitution and the Family,* 93 HARV. L. REV. 1156, 1177-87 (1980).

Professor Lupu might reject a characterization of his position as "nonoriginalist." *Cf.* Lupu, *supra* note 8, at 601-09 (criticizing the "interpretive"/"noninterpretive" dichotomy).

44. *See* Wellington, *supra* note 7. *See also* Wellington, *The Nature of Judicial Review,* 91 YALE L.J. 486 (1982).

45. *See* Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process,* 23 UCLA L. REV. 689 (1976) [hereinafter cited as Perry, *Ethical Function*]; Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government,* 66 GEO. L.J. 1191 (1978). For Professor Perry's most recent thoughts concerning nonoriginalist judicial review and the proper source or sources of nonoriginalist constitutional values, see M. PERRY, *supra* note 3; Perry, *supra* note 23.

46. *See, e.g.,* A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 236 (1962) (arguing that the Justices should "extract 'fundamental presuppositions' from their deepest selves, but in fact from the evolving morality of our tradition"); C. BLACK, DECISION ACCORDING TO LAW 39-42 (1981) (discussing constitutional adjudication based on "national ethical consensus"); Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice,* 93 HARV. L. REV. 1, 9 (1979) ("The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals."); Grey, *supra* note 40, at 706 (discussing the courts' "role as the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written Constitution," but rather derives from "contemporary moral and political ideals"); Sandalow, *supra* note 3, at 1050 ("The entirety of [our] history, together with current aspirations that are both shaped by it and shape the meaning derived from it, far more than the intentions of the framers, determine what each generation finds in the Constitution.").

47. *See* Roe v. Wade, 410 U.S. 113 (1973).

classifications based on gender,[48] alienage,[49] illegitimacy,[50] and perhaps mental retardation,[51] as well as race,[52] that is because societal values have pushed the clause "beyond its original 1868 concept" to "a point where . . . it embraces a 'broader principle.' "[53] At least on first consideration, however, the determination of these modern American values would seem a task for which the Supreme Court has no special competence or expertise. Indeed, to the contrary, the task would seem uniquely within the province of our popularly elected institutions, which are connected much more closely to the American people and their values.[54] The first two factors supporting the doctrine of judicial finality in the exercise of *originalist* judicial review thus are notably absent when the Court engages in *nonoriginalist* review: there are no fixed and unchangeable answers to be discovered,[55] and there is no apparent reason to prefer the judgment of the Supreme Court on these questions to the answers provided by other American institutions.

The third factor supporting the doctrine of judicial finality for *originalist* constitutional decisionmaking is closely related to the first two. Through the exercise of originalist review, the Supreme Court provides a disinterested forum for policing the framers' limitations on majoritarian government. This type of judicial review, including the doctrine of judicial finality that it embraces, is defensible not only because it serves this critical purpose, but also because the Court is limited to the identification of a fixed set of constitutional rights that it is well qualified

48. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).

49. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971).

50. *See, e.g.*, Mills v. Habluetzel, 456 U.S. 91 (1982).

51. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3260 (1985) (purporting to reject any special judicial scrutiny of classifications based on mental retardation, but invalidating such a classification on the ground that it "appear[ed] . . . to rest on an irrational prejudice against the mentally retarded"). *See also id.* at 3263-65 (Marshall, J., concurring in the judgment in part and dissenting in part) (arguing that despite the Court's disclaimer, its opinion and holding in fact reflect a heightened standard of equal protection review).

52. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880).

53. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 404, 404-05 (1978) (Blackmun, J. (separate opinion) (quoting McDonald v. Santa Fe Transp. Co., 427 U.S. 273, 296 (1976)). *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3268 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (noting that "constitutional principles of equality . . . evolve over time").

54. I will argue below that despite this seeming lack of competence, the Court in fact is capable of performing an important role in the identification and protection of modern national values. *See infra* Part II. *See generally* Fiss, *supra* note 46, at 12-17 (arguing that judges have the capacity to make a special contribution in the identification of "public values" due to the definition and structure of the judicial office).

55. One could argue that the *answers* change with the passage of time because the *questions* change, e.g., "What does the Equal Protection Clause mean *now*?"

to ascertain. Thus, not only does originalist review serve an important function; it does so with only a minimal intrusion on the principle of majoritarian consent.

Nonoriginalist review, by contrast, does not confine the Court to a limited set of constitutional rights. Rather, it permits the Court to undertake a potentially open-ended search for important American values, an endeavor that would not seem to fall within its judicial expertise. Given the remarkably broad potential scope of nonoriginalist review and the Supreme Court's apparent lack of special competence in its exercise, the performance of such review by an unelected judiciary cuts at the heart of majoritarian government. If the quite limited intrusion on majoritarianism effected by originalist review is justified by the need for an independent consideration of the framers' intentions, what justifies the much more massive assault on majoritarian decisionmaking reflected in the practice of nonoriginalist review?

Judicial lawmaking, of course, extends beyond the constitutional arena. In the construction of ambiguous statutes and in the articulation of common law rules, the Supreme Court and other courts develop rules of law independent of any direct sanction by elected officials. Such nonconstitutional decisionmaking may include a judicial determination of societal values and how those values should be implemented in legal doctrine,[56] thereby raising questions of judicial competence similar to those presented by nonoriginalist constitutional rulings. Although the appropriate parameters of nonconstitutional judicial lawmaking are open to serious debate, such lawmaking is never beyond the reach of majoritarian control, because ordinary legislative action can overturn nonconstitutional doctrine. A legislature can amend or enact a statute to replace a court-made interpretation or common law ruling with which it disagrees. The judicial and legislative dialogue on nonconstitutional legal issues may well reflect a healthy and productive lawmaking partnership,[57] but the popularly elected legislature retains the final word on questions of nonconstitutional law.

This is not so in the determination of constitutional rights, even when those rights are nonoriginalist in derivation. In this province, it is the Court that concludes the debate. Its decisions can supplant the legislative judgments under attack and replace them with judicial judgments that are themselves immune from subsequent legislative action.[58] Thus,

56. *See, e.g.,* Wellington, *supra* note 7, at 235-54.

57. *See, e.g.,* W. Popkin, *supra* note 26.

58. The Court thus "concludes the debate" in the sense that its constitutional rulings constitute final and determinative statements of law, reversible only by constitutional amend-

the problem raised by nonoriginalist judicial review is not simply the legitimacy of judicial lawmaking based on societal values.[59] Rather, it is the *finality* of the Court's nonoriginalist constitutional decisions that makes the problem of legitimacy especially acute.[60] Why should the Court, and not the popular branches, have the final say in determining which societal values warrant constitutional protection?[61] Why should the Court, in making *this* type of constitutional decision, be the "ultimate interpreter of the Constitution,"[62] "supreme in the exposition of [its] law"?[63]

II. The Functions and Functional Operation of Nonoriginalist Judicial Review

A defense of nonoriginalist judicial review in the adjudication of constitutional rights requires the formulation of a normative theory.[64] To be taken seriously, the theory must recognize the basic principle of majoritarian consent and the countermajoritarian nature of nonoriginalist review.[65] Moreover, because nonoriginalist review may take more than one form,[66] the theorist must describe the particular sort of

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ment or by the Court's own change of opinion. *See supra* text accompanying note 13. In a more general sense, of course, the debate can continue, and it might even lead to a constitutional amendment or to a change in the Supreme Court's doctrine. *See generally supra* note 16 and accompanying text; *infra* notes 144-149 and accompanying text.

59. As Professor Thomas W. Merrill has noted, "the fact that constitutional lawmaking—including nonoriginalist judicial review—is immune from congressional override may justify us in regarding it as an especially troubling form of judicial lawmaking, but this fact does not support the claim that it is a different type of judicial lawmaking altogether." Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1, 6 (1985).

60. *Cf.* J. AGRESTO, *supra* note 5, at 102-07 (criticizing the doctrine of judicial finality on constitutional questions as highly problematic in a constitutional system of checks and balances); Wellington, *The Nature of Judicial Review, supra* note 44, at 487 ("It is . . . the issue of finality, more than other questions posed by majoritarian theory, that proponents of judicial review must address.").

61. As Professor Alexander M. Bickel concluded, "nothing . . . can alter the essential reality that judicial review is a deviant institution in the American democracy." A. BICKEL, *supra* note 46, at 18. This deviance, I have argued, arises in large part from the doctrine of judicial finality as applied to the recognition of nonoriginalist constitutional rights.

62. Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962).

63. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

64. Needless to say, such a normative theory cannot exist in isolation. It must consider the descriptive reality of our modern constitutional system and the Supreme Court's role in that system. *Cf.* Fiss, *Conventionalism,* 58 S. CAL. L. REV. 177, 197 (1985) ("Theory informs practice, just as surely as practice informs theory . . .").

65. *But cf.* Chemerinsky, *supra* note 29 (arguing that the academic debate concerning nonoriginalist review has given too much weight to the principle of majoritarian rule).

66. *See, e.g., supra* notes 43-46 and accompanying text.

nonoriginalist review he contemplates, including a description of the source or sources from which he believes nonoriginalist constitutional values properly may be drawn.

A. The Progressive Function of Nonoriginalist Review

I believe that nonoriginalist judicial review is legitimate as a matter of political theory because it is capable of serving a vital function in our society, a function sufficiently important that we as a society are willing to accept its performance by the unelected Supreme Court.[67] More specifically, I believe that the Supreme Court properly may further moral progress in the United States by drawing nonoriginalist constitutional values from the pattern of American moral development, as revealed by our history and traditions, our contemporary national values, and the emerging trends of our national morality.

We evidence our nation's morality most clearly through the adoption of legislative or other official governmental policies, but also in less formal ways—through societal customs and practices, for example, and even through public opinion itself.[68] Over the course of history, this evidence reveals an evolutionary transformation of American beliefs and practices. At least on issues of individual rights, moreover, this long-term pattern of change tends to reflect positive moral growth.

It is difficult to deny the general proposition that America gradually has developed answers to individual rights questions that are morally superior to the answers that came before. Thus, over our history, we have come to reject the morality of prior practices once regarded as acceptable. Our society once endorsed a racially based system of slavery; we now see racial discrimination as generally intolerable. We once denied women many of the rights held by men, including even the basic right to vote; we now regard most forms of gender-based discrimination as morally offensive and impermissible. And witness our recognition of greater rights for the institutionalized,[69] the handicapped,[70] and the poor.[71]

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67. *See* Conkle, *supra* note 6, at 638-58 (arguing that Congress' failure to adopt legislation restricting the jurisdiction of the Supreme Court reflects at least some measure of majoritarian consent to the practice of nonoriginalist judicial review).

68. The nation's morality, in the sense I have in mind, depends primarily on its *decisions* concerning what is right and wrong, and not so much on an independent evaluation of the moral *propriety* of those decisions. Thus, the evidence of America's morality—its moral stance—regarding any given issue includes all societal decisions that relate to that issue, even decisions that some might consider "immoral" or "amoral." Nonetheless, as discussed in the text, I believe that the resultant pattern of American moral development is likely to reflect positive moral growth.

69. *See, e.g.*, 42 U.S.C.A. §§ 6000-6083 (1983 & Supp. 1985) (authorizing federal assistance for institutionalized and other persons with developmental disabilities).

To say that America is on a general course of positive moral development concerning individual rights, however, is not to say that we always push forward on that course. To the contrary, as Professor Robert N. Bellah has written, "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."[72] Although our general, long-term pattern of moral development is likely to reflect moral growth and change for the better, we act through temporary majorities reflecting temporary opinions. As a result, we may deviate from our general course, or our progress may slow to a halt. Thus, our long-term pattern of moral development is likely to suggest answers that are morally superior to those of any transient majority, and it is here that the Supreme Court can play an important role through the exercise of nonoriginalist review. By drawing nonoriginalist constitutional values from America's long-term pattern of moral growth and using those values to limit the power of transient majorities, the Court can further the pursuit of answers that are morally sound.[73]

Under this method of nonoriginalist review, the ultimate source of the Supreme Court's decisional norms lies not in a set of unchanging values constitutionalized by the framers, but rather in the evolutionary development of societal thinking concerning issues that implicate individual rights. Thus, whenever the Court is able to identify a historical pattern of changing moral thought concerning a particular individual rights question, the Court may properly invalidate governmental practices that lag behind the developing moral advance and conflict with what has become the contemporary national morality. In like fashion, the Court may also, in effect, push America forward on its course of moral development by recognizing constitutional rights not yet supported by the contemporary morality, but supported by emerging socie-

70. *See, e.g.*, 20 U.S.C.A. §§ 1400-1454 (1978 & Supp. 1985) (Education of the Handicapped Act).

71. Although some would contend that we have not done nearly enough, we have adopted in recent decades a wealth of federal, state, and local poverty programs.

72. R. BELLAH, THE BROKEN COVENANT: AMERICAN CIVIL RELIGION IN TIME OF TRIAL 2 (1975).

73. *Cf.* Tennessee v. Garner, 105 S. Ct. 1694, 1705 (1985) (construing the Fourth Amendment to depart from the common law rule concerning police use of deadly force when "the long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and [when] that remains the rule in less than half the States").

tal values that are likely to prevail in the future.[74]

B. The Nationalizing Function of Nonoriginalist Review

As we have seen, nonoriginalist judicial review can serve a vital function by supporting and furthering America's moral development. Such review also can serve a second important function, related to the first but of independent significance as well. This second function stems from the national scope of the Supreme Court's constitutional rulings.

Through the recognition of constitutional rights, the Supreme Court displaces state and local answers to questions concerning individual rights and replaces them with *national* answers, for the Court's constitutional rulings have nationwide application.[75] At first glance, it might appear that this nationalizing effect of nonoriginalist review is *dys*functional in the American governmental system. Professor Earl M. Maltz, for example, has argued that "local 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."[76] The recognition of na-

74. My analysis of nonoriginalist review as a vehicle for furthering American moral progress is drawn from a more elaborate discussion in Conkle, *supra* note 6, at 626-37.

In a recent opinion expressing the views of three Justices, Justice Marshall appears to have adopted this suggested approach to nonoriginalist constitutional decisionmaking, at least under the Equal Protection Clause:

> Courts . . . do not sit or act in a social vacuum. Moral philosophers may debate whether certain inequalities are absolute wrongs, but history makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a natural and self-evident ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom. . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause. It is natural that evolving standards of equality come to be embodied in legislation. When that occurs, courts should look to the fact of such change as a source of guidance on evolving principles of equality.

City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3268-69 (1985) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citations omitted).

75. The vast majority of the Supreme Court's constitutional decisionmaking, of course, involves the review of state and local practices, not federal ones.

76. Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust,* 42 OHIO ST. L.J. 209, 221 (1981). *See id.* at 216 ("[W]hatever one's theory of the nature of fundamental rights and protected classes, it should be consistent with the basic concept of dual sovereignty that undergirds the constitutional system.").

The Supreme Court's recognition of constitutional rights does not entirely erode the concept of local autonomy. While its rulings set the minimum national standards for the protection of individual rights, states and localities may choose to set local standards that provide *more* protection for individual rights than the Court has required. *See generally infra* notes 127-128 and accompanying text.

tional constitutional rights conflicts with the policy of federalism, a policy that favors state and local governmental decisionmaking.[77]

Federalism is an important governmental value.[78] Local decisions may be tailored to local conditions that differ from those prevailing elsewhere.[79] They may also be tailored to differing local values, thereby permitting government to be more responsive to the wishes of more Americans.[80] Finally, the variety of state and local jurisdictions provides a "laboratory" for legal experimentation, permitting new and different approaches to legal problems to be developed and tested and, if found successful, eventually adopted on a broader geographic scale.[81]

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77. *See generally* Linde, *E Pluribus—Constitutional Theory and State Courts,* 18 GA. L. REV. 165, 193-200 (1984) (discussing the role of federalism in the determination of federal and state constitutional rights).

78. To say that federalism is an important governmental value, of course, in itself says nothing about the role of the judiciary vis-a-vis the political process in the protection of that value. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976), in which the Supreme Court had recognized a Tenth Amendment limitation on Congress' power to regulate state and local governmental entities); J. CHOPER, *supra* note 5, at 171-259 (arguing that the Supreme Court should abstain from deciding constitutional claims that the exercise of national power violates "states' rights," leaving those questions instead to the national political branches). *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) (suggesting that the states, through the national political process, can protect themselves from intrusive federal legislation).

79. *Cf.* Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 264 (1983) (Burger, C.J., dissenting) ("Since local conditions [reflecting occupational risks, climate, geography, and demography] generally determine how a job should be performed, and who should perform it, the authority and responsibility for making employment decisions must be in the hands of local governments, subject only to those restrictions unmistakably contemplated by the Fourteenth Amendment.").

80. As Professor Maltz has noted, "the concept of pluralism is based on the idea that local groups should generally be permitted to effectuate their own choices of basic values, even if such values differ from those of the nation as a whole." Maltz, *supra* note 76, at 216 n.32. *Cf.* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005, 1031-32 (1985) (Powell, J., dissenting) (arguing that democratic self-government operates most effectively and responsively at the state and local levels).

81. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See* Equal Employment Opportunity Comm'n v. Wyoming, 460 U.S. 226, 265 (1983) (Burger, C.J., dissenting) ("Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experiences and activities of all the rest."); Williams v. Florida, 399 U.S. 78, 133 (1970) (Harlan, J., dissenting) (noting that federalism "leave[s] ample room for governmental and societal experimentation in a society as diverse as ours").

Arguably, federalism might also serve another, independent purpose—protecting "the security of liberty in America . . . [through] the dispersion of governmental power across a federal system." Duncan v. Louisiana, 391 U.S. 145, 173 (1968) (Harlan, J., dissenting). *See* THE FEDERALIST No. 51 (J. Madison) (J. Cooke ed. 1961). Assuming that the other benefits of

In significant ways, however, Americans in the 1980's are closer together than ever before. We communicate instantaneously throughout the length and breadth of the country. The national media reach every hamlet.[82] Not only do we learn quickly about matters of public interest arising throughout the nation, but we frequently find ourselves physically present in distant states and localities. We travel periodically for business and pleasure, and are prone to relocate for economic or personal reasons.[83] As a result of the remarkable twentieth-century transformation of communication practices and personal mobility in the United States—a transformation that has accelerated in recent decades—we are more likely than ever to know about, and to have reason to care about, significant public policies in force in states and localities other than our own.[84]

On certain issues concerning individual rights, our interest in these public policies goes well beyond mere curiosity. Abortion, the death penalty, "reverse" discrimination, homosexual rights, religion in the public schools—issues such as these evoke intense and passionate feelings. They touch us at the most basic levels of our morality and depend for their resolution on our innermost values. Yet they are matters on which we are bitterly divided.

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federalism are outweighed by the need for national action, however, a removal of power from the national government would seem a high price to pay for the incidental protection of individual liberty that might ensue. The argument reduces essentially to a call for governmental inefficiency, a call that must be rejected in the governance of a complex society such as ours. *But cf.* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 950, 959 (1983) (recognizing "the need to divide and disperse power in order to protect liberty," even when the cost is to "impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . .").

82. As Joshua Meyrowitz has observed:

> Traditionally, neighborhoods, buildings, and rooms have confined people, not only physically, but emotionally and psychologically as well. Now, physically bounded spaces are less significant as information is able to flow through walls and rush across great distances. As a result, *where* one is has less and less to do with what one knows and experiences.

J. MEYROWITZ, NO SENSE OF PLACE: THE IMPACT OF ELECTRONIC MEDIA ON SOCIAL BEHAVIOR, at viii (1985) (emphasis in original).

83. American families move an average of every four years, and many of these moves reflect interstate migrations. *See The Legacies of World War II,* U.S. NEWS & WORLD REP., Aug. 5, 1985, at 38, 41; U.S. DEPT. OF COMMERCE BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, POPULATION CHARACTERISTICS SERIES P-20, NO. 393, GEOGRAPHIC MOBILITY: MARCH 1982 TO MARCH 1983, at 1 (Table A).

84. As Dean Sandalow has written, "Increased mobility and the growth of mass communication have more and more led us to see ourselves as one nation and, together with a rising egalitarianism, have led to a reduced willingness to treat each state as a separate political community." Sandalow, *supra* note 3, at 1042. *But cf.* Schambra, *Progressive Liberalism and American "Community",* PUB. INTEREST, Summer 1985, at 31 (arguing that the idea of a national American community, in many respects, has declined in recent years).

Despite our deep divisions on these questions of individual rights, the questions require answers, and they must be *American* answers. On moral issues such as these, there are no differing local conditions sufficient to justify differing local answers, and local "experimentation" is hardly well-suited to moral inquiry. Moreover, although the prevailing moral values of our citizenry may well differ by state or region, the pluralistic benefits of federalism are outweighed in this sphere by the interests of our national political community, a community that is growing closer together every day.[85] The issues simply are too important to America, and too basic to each of our citizens, to be subject to geographic disparity.[86] They cry out for *national* resolution,[87] which the Supreme Court can provide through the recognition of nonoriginalist constitutional rights.[88]

In the exercise of nonoriginalist judicial review, then, the Supreme Court can perform the progressive function of furthering the cause of American moral growth and, in addition, the independently significant function of nationalizing our governmental policies concerning controversial individual rights. These functions overlap, for whenever the Court recognizes a constitutional right in furtherance of American moral

85. Perhaps differing local *values* are no less a differing local *condition* than geography, climate, or demography. But this is a matter of terminology that in no way affects my basic claim: even if characterized as a differing local condition, a difference in local values cannot overcome the need for a national resolution of the issues that I describe.

86. Arguably, the problem of geographic disparity is mitigated by the very mobility that I have discussed. Given their mobility, American citizens might choose to establish and maintain their residence in political communities adhering to their own views on the individual rights issues that concern them most. Witness, for example, the prominent homosexual population in San Francisco. However important these various issues may be, however, they rarely provide sufficient reason either to justify or to prevent relocation. And to the extent that they do, there is a genuine risk of Balkanizing the American polity, a risk that carries potentially extreme consequences. We dare not forget, for example, that one fundamental issue of individual rights so divided our society by state and region that it led to a civil war.

87. *Cf.* Koukoutchos, *A No-Win Proposal on Abortion Rights,* N.Y. Times, July 25, 1985, at A23 col. 1 ("Fundamental rights, unlike liquor regulations or traffic laws, should not vary from state to state."). *See generally* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 193 (1985) ("Some minimum homogeneity of social institutions is necessary if people are to consider themselves Americans first and Georgians or New Yorkers second.").

88. The resolution of these questions on a nationwide basis—presenting a unified American position—might also facilitate the role of the United States as an international leader on questions of individual rights. *See generally* Barber, *The Soul of Foreign Policy: Rights,* N.Y. Times, Oct. 29, 1984, at A23 col. 2 (arguing that "human rights ought to be the soul of United States foreign policy"). Indeed, some might contend that my focus on *American* answers is too narrow—that there are *universally* correct answers to moral questions that do not depend on national boundaries. Whatever the strength of that position, it does not affect my argument here. My point is merely that *American* answers are preferable to state and local ones on highly controversial issues of individual rights. I make no claim, and have no need to claim, that American answers are preferable to any universal moral truth that might exist.

progress, it also provides a national resolution for the issue that it confronts. The nationalizing function, however, also can operate separately: even when there is no pattern of American moral development concerning a controversial question of individual rights, the need for a national resolution remains, and the Court can provide that resolution through the recognition of a national constitutional right.[89]

C. The Functional Operation of Nonoriginalist Review: The Problem of Judicial Finality Revisited

By identifying two important functions that nonoriginalist judicial review can serve, I have offered a theoretical defense of this governmental practice.[90] But the problem is more complex, because nonoriginalist review, as presently constituted, includes the doctrine of judicial finality. I must therefore consider the functional operation of nonoriginalist review in light of this basic doctrine.

On some issues of individual rights, the pattern of American morality is relatively clear, and the Supreme Court thus is reasonably capable of providing "final" answers in its identification of contemporary and emerging moral principles. For example, the pattern of our society's thinking concerning racial discrimination was sufficiently clear in 1954 that *Brown v. Board of Education*[91] may be viewed as a decision that correctly predicted, and thereby accelerated, the development of America's morality in this area.[92] Likewise, the Court's elevated standard of review in evaluating gender-based classifications seems quite in keeping with our evolving national beliefs concerning the offensiveness of gender discrimination.[93] Indeed, the gender-based discrimination cases

89. The recognition of national constitutional rights does not prevent states and localities from being *more* protective of individual rights than the Supreme Court has required. *See supra* note 76. Moreover, if one or more states or localities in fact takes a more protective approach, the nationalizing effect of the Court's constitutional rulings is to that extent diminished. *See infra* notes 127-128 and accompanying text.

90. My position defending the legitimacy of nonoriginalist judicial review in fact includes another essential component—evidence of majoritarian consent to the practice through Congress' failure to adopt legislation restricting the Supreme Court's appellate jurisdiction. *See* Conkle, *supra* note 6, at 638-58. *See also supra* note 67 and accompanying text.

91. 347 U.S. 483 (1954).

92. *See* Conkle, *supra* note 6, at 635.

93. In Frontiero v. Richardson, 411 U.S. 677 (1973), for example, the plurality opinion cited congressional action reflecting an enhanced societal sensitivity to gender-based classifications:

> We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, *sex,* or national origin." Similarly, the

exemplify a broad class of cases in which the Court properly recognizes constitutional rights on the basis of moral principles that already have grown to command national support. These cases typically involve the invalidation of state or local governmental practices that lag behind developing national standards, as reflected, for example, in the policies of Congress or of a majority of the states. In such cases, the Court need not attempt the difficult task of predicting the future course of American moral progress, for the governing norms may be drawn from the *contemporary* national morality.[94] Whenever the Court, with a fair degree of confidence, can determine this contemporary morality—or in a rare case such as *Brown,* the *emerging* American morality—nonoriginalist judicial review can properly serve its progressive function and, incidentally, its nationalizing function as well.[95]

On certain matters, however, America's evolving morality is far from clear. There may be an apparent pattern of moral development, but one that is incomplete or uncertain. In such cases, nonoriginalist review falters in its progressive function. If there is an apparent pattern of moral development, the cause of moral growth might well be furthered by the recognition of a constitutional right. Given the finality of such a judicial ruling, however, the Supreme Court may be reluctant to act in the absence of a more compelling case.[96] Conversely, the Court might

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> Equal Pay Act of 1963 provides that no employer covered by the Act "shall discriminate . . . between employees on the basis of *sex*." And section 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

Id. at 687-88 (plurality opinion) (emphasis in original) (footnotes omitted).

94. *See, e.g.,* Solem v. Helm, 463 U.S. 277, 300 (1983) (holding a life sentence for a nonviolent recidivist unconstitutional when it appeared that the defendant had been punished "more severely than he would have been in any other State"); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 n.4 (1966) (invalidating Virginia's poll tax when "[o]nly a handful of States" continued to employ such taxes at the time the Court rendered its decision); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a statute that criminalized the use of contraceptives, even by married persons, when Connecticut was the only state that criminalized this practice); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion) (recognizing a constitutional requirement of publicly provided transcripts on appeal for indigent criminal defendants when most states had already recognized the need for providing such transcripts).

95. In many constitutional cases, of course, the Supreme Court finds substantial guidance in its prior precedents. *See* Sedler, *supra* note 8, at 118-19. The use and development of such a body of precedents, moreover, can serve the important purpose of reconciling and harmonizing various aspects of the developing American morality. *See* Conkle, *supra* note 6, at 637 n.183.

96. Such reluctance would reflect a well-grounded concern about the disabling effects of a constitutional ruling on the majoritarian process. *Cf.* California v. Carney, 105 S. Ct. 2066,

recognize a constitutional right on the basis of uncertain evidence. If so, the Court's decision might not reflect the actual pattern of national moral development at all. The Court's decision, in other words, might be wrong—wrong, but nonetheless immunized from majoritarian correction by the doctrine of judicial finality.

The recognition of any constitutional right, even one that fails to reflect the developing American morality, does serve the nationalizing function of nonoriginalist review. But this function also is frustrated by the doctrine of judicial finality. The nationalizing function, standing alone, could be performed as well by Congress as by the Supreme Court, for it is the existence of a national standard that counts for this purpose, not its source or content. Yet because Congress is prone to avoid controversial questions of individual rights,[97] leaving these matters entirely to Congress may be tantamount to leaving them unresolved. Judicial action, on the other hand, coupled with the doctrine of judicial finality, seriously undercuts the principle of majoritarian policymaking. It simply will not do in a democratic society to have the Supreme Court imposing "final" answers merely for the sake of achieving national standards that could better be provided by the popularly elected national legislature. When faced with legislative intransigence, however, the failure of the Supreme Court to act may mean that we will have no national standards at all. Thus, the nationalizing potential of nonoriginalist review remains unfulfilled, inhibited by the doctrine of judicial finality.

These problems may be highlighted by examining three of the most controversial individual rights issues confronting the modern Supreme Court: abortion, homosexual rights, and "reverse" racial discrimination. In each of these areas, there may be evidence of a pattern of American moral development, but the evidence remains fragmentary and uncertain. Nonetheless, the issues raise fundamental moral questions that demand national resolution. In cases such as these, the prevailing model of nonoriginalist review is severely impeded by the doctrine of judicial finality.

The Supreme Court addressed the issue of abortion in its 1973 decision in *Roe v. Wade*.[98] At the time *Roe* was decided, there appeared to

2073 (1985) (Stevens, J., dissenting) ("The breadth of this Court's mandate counsels greater patience before we offer our binding judgment on the meaning of the Constitution.").

97. There are notable exceptions, such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965. These are *exceptions,* however, because members of Congress typically avoid any controversy that might jeopardize their incumbency. As California Supreme Court Justice Roger J. Traynor has noted, "Legislators have become astute at turning a deaf ear to highly visible issues on which they do not wish to gamble their political lives." Traynor, *The Limits of Judicial Creativity,* 63 IOWA L. REV. 1, 8 (1977).

98. 410 U.S. 113 (1973).

be a liberalizing trend in favor of a woman's right to have an abortion,[99] and the Court's decision giving constitutional protection to that right might be viewed as an attempt to discern and give effect to an emerging American morality on this issue.[100] The evidence of a moral pattern in 1973, however, offered exceedingly weak support for the Court's decision,[101] and, even today, the debate over abortion continues largely unabated. Although *Roe* provided a national answer to this fundamental issue of individual rights, and that in itself was important,[102] the answer might not accurately reflect the pattern of American moral development. Yet the Court's decision remains protected by the doctrine of judicial finality.[103]

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99. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. Three states permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code § 230.3.

Id. at 139-40 (footnotes omitted). *See* Maltz, *Murder in the Cathedral—The Supreme Court as Moral Prophet,* 8 U. DAYTON L. REV. 623, 630-31 (1983) ("Through the legislative process of exchange of views and compromise, state laws were being reformed, with a gradual but perceptible drift toward liberalization.").

100. Writing in 1976, for example, Professor Perry defended *Roe* as a decision that "struck down laws that were contrary to the evolving, maturing conventions of the moral culture." Perry, *Ethical Function, supra* note 45, at 735.

101. By the time *Roe* was decided, fourteen states had liberalized their abortion laws by passing legislation patterned on section 230.3 of the Model Penal Code, which permitted a licensed physician to perform an abortion, under specified conditions, if he found a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse." MODEL PEN. CODE § 230.3(2). *See* Roe v. Wade, 410 U.S. 113, 140 n.37 (1973). Even in these fourteen states, however, abortions under most circumstances still were prohibited as criminal offenses. Only four states had recognized a relatively unrestricted right to abortion during early pregnancy. *See id.*

102. *Cf.* Koukoutchos, *supra* note 87 ("If a woman has a basic right to decide whether or not to have children, shouldn't she have this right regardless of her state of residence? And if the right to life is sacred, shouldn't it be just as protected in Los Angeles as in Little Rock?").

103. As Professor Maltz has observed, "In the absence of a constitutional amendment, the standards set out in *Roe* have been viewed by all concerned as the unalterable base from which further debate must proceed." Maltz, *supra* note 99, at 631. *Cf. id.* at 630-31 (arguing that the Court's decision in *Roe* inhibited an ongoing debate concerning the legality of abortion).

Due to the finality of *Roe,* even Congress has been precluded from directly addressing, and perhaps resolving, the conflicting moral considerations that affect the issue of abortion. Perhaps as a result, Congress has responded to the Court's decision with a "compromise" that it does consider to be within its constitutional power, but that reflects a policy judgment many would regard as unseemly, if not shameful: a judgment disfavoring the right to abortion, but only at the expense of the poor, a group whose abortion rights the Supreme Court has been

Consider, by contrast, the Supreme Court's response to the issue of homosexual rights. In a summary decision in 1976, the Court rejected a claim of constitutional protection for consensual homosexual relations,[104] and, on several recent occasions, the Court has refused to address other questions involving homosexual rights.[105] Although developing societal beliefs concerning homosexual rights remain uncertain, the evidence would suggest an emerging American morality that would favor the protection of such rights.[106] These questions, moreover,

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unwilling to protect. *See* Harris v. McRae, 448 U.S. 297 (1980) (upholding the constitutionality of the federal "Hyde Amendment," which generally prohibited the use of federal funds to reimburse abortion costs under the Medicaid program). *See also* 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). For a discussion of other congressional responses to *Roe,* see *infra* note 149.

104. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975). Given the summary nature of the decision as well as subsequent developments in the Supreme Court, the precedential status of *Doe* is open to serious question. *See* Saphire, *supra* note 9, at 772-77. Indeed, the Eleventh Circuit recently found that consensual homosexual relations are entitled to presumptive constitutional protection, the Supreme Court's decision in *Doe* notwithstanding. *See* Hardwick v. Bowers, 760 F.2d 1202, 1207-10 (11th Cir. 1985). The Supreme Court, however, has granted certiorari to review the Eleventh Circuit's decision. *See* 106 S. Ct. 342 (1985).

105. In its 1983-84 Term, for example, the Court dismissed a challenge to a New York law that criminalized loitering for the purpose of homosexual solicitation on the ground that its prior grant of certiorari had been improvident. *See* New York v. Uplinger, 104 S. Ct. 2332 (1984) (per curiam). In its 1984-85 Term, over the dissent of two Justices, the Court denied certiorari in a case contesting the dismissal of an Ohio high school guidance counselor who was bisexual and who had revealed this fact to her co-workers. *See* Rowland v. Mad River Local School Dist., 105 S. Ct. 1373 (1985). In the same term, the Court also disposed of a challenge to an Oklahoma statute that permitted the dismissal of public school teachers for "advocating" or "encouraging" homosexuality, affirming the lower court decision by an equally divided vote and without any written opinions, thereby providing neither a national precedent nor any other guidance on the issues presented. *See* Board of Educ. v. National Gay Task Force, 105 S. Ct. 1858 (1985), *aff'g* 729 F.2d 1270 (10th Cir. 1984). For a listing of numerous other cases in which the Supreme Court has refused to consider questions involving homosexual rights, see Katz, *Sexual Morality and the Constitution: People v. Onofre,* 46 ALB. L. REV. 311, 341 n.167 (1982).

106. In the last quarter century, for example, some twenty-three state legislatures have decriminalized homosexual activity conducted in private by consenting adults. *See* Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States,* 30 HASTINGS L.J. 799, 950-51 (1979) (listing twenty-one states); *see also* 1978 N.J. LAWS, ch. 95 § 2C:98-2 (effective Sept. 1, 1979) (repealing N.J. STAT. ANN. § 2A:143-1 (West 1969)); 1983 WIS. LAWS, Act. 17 § 5 (effective May 12, 1983) (amending WIS. STAT. ANN. § 944.17 (West 1982)). *Cf.* Commonwealth v. Balthazar, 366 Mass. 298, 302, 318 N.E.2d 478, 481 (1974) (construing Massachusetts sodomy statute not to reach private activity by consenting adults). Similar patterns of change, moreover, might support a more general principle of nondiscrimination against homosexuals. *Cf. Annual Meeting of the American Bar Association,* 54 U.S.L.W. 2037, 2040 (July 16, 1985) (discussing the ABA House of Delegates' narrow rejection of a resolution that "without approving or endorsing homosexual activity" would have urged "federal, state and local governments to adopt legislation prohibiting discrimination in

perhaps no less than the issue of abortion, are of such societal and individual importance as to require resolution on a nationwide basis. Perhaps concerned by the finality of its judgments, however, the Supreme Court has refused to protect these rights, and a national resolution of these questions has yet to be attained.[107]

The propriety of "reverse" or "compensatory" racial discrimination—the discrimination resulting from preferential treatment for racial groups that have been victimized in the past—is one of the most difficult individual rights issues of our time. Given the complex moral considerations involved, it is not surprising that our society's moral stance on this issue remains in flux; nor is it surprising that the Supreme Court has been unable to provide any clear guidance in this area.[108] Nevertheless, the issue demands a national resolution, which the Court might better promote were it not induced to caution by the impending finality of its con-

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employment, housing and public accomodations on the basis of sexual orientation"). *See generally* Slovenko, *Foreward—The Homosexual and Society: A Historical Perspective,* 10 U. DAYTON L. REV. 445 (1985).

107. Currently before the Court is a case that could be used as a vehicle for according constitutional protection to consensual homosexual relations. *See* Bowers v. Hardwick, 106 S. Ct. 342 (1985), *granting cert. to* 760 F.2d 1202 (11th Cir. 1985). Given the Court's prior reluctance to recognize homosexual rights, however, the Court may well use the case merely to reaffirm its earlier refusal to grant the requested constitutional protection. *See also supra* note 104. *Cf.* Rowland v. Mad River Local School Dist., 105 S. Ct. 1373, 1378 (1985) (Brennan, J., dissenting from denial of certiorari) ("Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement, are important questions that this Court has never addressed, and which have left the lower courts in some disarray."); Saphire, *supra* note 9, at 809 ("[W]hatever the reason for [the Supreme Court's] failure (reluctance? unwillingness?) thus far to explicitly extend the right to privacy to homosexual relations, the jurisprudential framework established by its modern privacy decisions points logically to such a result.").

108. The Court has considered the constitutionality of compensatory racial discrimination in two prominent cases, but each was decided with multiple, conflicting opinions and without the benefit of a majority rationale. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). Although the Court also had granted review in two additional cases raising similar issues, it disposed of each without reaching the merits. *See* Johnson v. Board of Educ., 457 U.S. 52 (1982) (per curiam) (remanding for consolidation with a related case); Minnick v. California Dep't of Corrections, 452 U.S. 105 (1981) (dismissing the writ of certiorari on the ground that the lower court decision was not "final" within the meaning of the Supreme Court's jurisdictional statute).

Recently, the Court granted certiorari in yet another case involving this problem. *See* Wygant v. Jackson Bd. of Educ., 746 F.2d 1152 (6th Cir. 1984), *cert. granted,* 105 S. Ct. 2015 (1985). The Court also has granted certiorari in two additional cases involving issues of compensatory racial discrimination arising under Title VII of the Civil Rights Act of 1964. *See* Equal Employment Opportunity Comm'n v. Local 638, 753 F.2d 1172 (2d Cir.), *cert. granted sub nom.* Local 28 v. Equal Employment Opportunity Comm'n, 106 S. Ct. 58 (1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), *cert. granted sub nom.* Local No. 93, International Assoc. of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985).

stitutional decisions.[109]

On each of these issues, the functional operation of nonoriginalist judicial review has been hindered by the doctrine of judicial finality. As to abortion, the Court's decision in *Roe v. Wade* may well have frustrated, not furthered, our moral development on this issue, for it is not at all clear that the "final" answer provided by the Court is an answer that the American society either embraces now or is likely to embrace in the foreseeable future. As for homosexual rights, on the other hand, the very prospect of a "final" judicial decision may have induced the Court to inaction, thereby leaving unfulfilled not only the progressive function of nonoriginalist review, but the nationalizing function as well. The prospect of finality likewise may be inhibiting the Court in the area of compensatory racial discrimination, an area in which the Court might otherwise at least be able to serve the nationalizing function of nonoriginalist review by developing a national response to this problem.

My concern about the doctrine of judicial finality, of course, is linked to my functional defense of nonoriginalist judicial review, a defense that justifies this practice on the basis of its progressive and nationalizing functions. Perhaps nonoriginalist review serves other functions as well.[110] If so, there may be different implications for the doctrine of judicial finality. But unless one is willing to reject entirely the utility of the functions I have described, one cannot avoid the conclusion that a uniform application of the doctrine of judicial finality reduces the utility of nonoriginalist review. At least *to the extent that* nonoriginalist review is or can be designed to further these progressive and nationalizing functions, the doctrine of judicial finality can work to frustrate the operation of this practice.

III. Reshaping Judicial Review: Toward a Model of Final and Provisional Constitutional Decisionmaking

I have no doubt that any radical proposal for reshaping judicial review would be rejected, and properly so. The practice is a well ingrained and fundamental component of our governmental system, and it gener-

109. Justice Stevens, for one, clearly feels the need for caution in this area, given "the risk of error associated with the ultimate judicial resolution of the underlying constitutional questions" raised by compensatory racial discrimination. *See* Stevens, *Judicial Restraint,* 22 SAN DIEGO L. REV. 437, 446 (1985). Moreover, due to the doctrine of judicial finality, Stevens' caution requires him to endorse a policy of Supreme Court "procrastination and indecision" on these important constitutional questions. *See id.* at 443. *See also id.* at 443-46.

110. *See, e.g.,* J. ELY, *supra* note 5 (arguing that judicial review serves a "representation-reinforcing" function); M. PERRY, *supra* note 3, at 102 (suggesting that the Supreme Court may be capable of seeking out the "right answers to political-moral problems").

ally has served our nation well. Yet the very importance of judicial review demands that it operate at a functionally optimal level, and I have identified significant functional problems in the operation of nonoriginalist judicial review. I therefore am prepared to suggest, and to attempt to justify, a modest revision in the Supreme Court's institutional practice.

I propose that the Supreme Court abandon the doctrine of judicial finality in selected individual rights cases. In such cases, the Court would recognize constitutional rights, but would announce that its decisions were provisional in nature, that is, subject to modification by congressional action. These decisions by the Court would provide governing constitutional standards unless or until Congress addressed the issues in question, in which case the congressional action would thereafter prevail.

In the exercise of this provisional judicial review,[111] the Supreme Court would act much as it does in policing state actions under the "dormant" Commerce Clause. In that area, the Court's decisions finding state actions unconstitutional can be overturned by Congress if it elects to authorize the state actions under attack.[112] Under my proposed model, provisional rulings concerning individual rights would have a similar constitutional status.

A. A Functional Justification of Provisional Judicial Review

The utility of provisional judicial review springs from the deficiencies of final judicial review. The doctrine of judicial finality shields nonoriginalist constitutional decisions from subsequent legislative action, even when such action might better reflect the developing American morality and might thereby further American moral progress to a greater extent than the Supreme Court's judicial decisions. If the Court fails to act, however, both the progressive and the nationalizing functions of nonoriginalist review go entirely unfulfilled. Provisional review would fill this void, providing an important supplement to final review in the service of these functions.

In furthering the progressive function of nonoriginalist review, a provisional constitutional ruling typically would address a state or local,

111. I borrow my terminology from Professor Paul R. Dimond. *See* Dimond, *Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review*, 12 HASTINGS CONST. L.Q. 201 (1985). Dimond's model of provisional review, however, and his justifications for that model, differ markedly from those presented here. *See infra* note 165 and accompanying text.

112. As the Court recently noted in Northeast Bancorp., Inc. v. Board of Governors of the Fed. Reserve Sys., 105 S. Ct. 2545, 2554 (1985), "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."

as opposed to a national, governmental practice. Such a ruling would be appropriate when the Supreme Court perceived a pattern of national moral growth justifying the recognition of a constitutional right, but when the Court lacked sufficient confidence to make its own judgment conclusive on Congress, the most broadly based and representative national political body. The Court thus would offer an immediate opinion on the issue in question, based on its assessment of American values, and at the same time invite Congress to disagree if it wished to provide a different national resolution.

The issues of abortion and homosexual rights provide useful examples. Faced in 1973 with a distinct but hardly definitive trend toward the liberalization of state abortion laws,[113] the Supreme Court could have made its ruling in *Roe v. Wade*[114] provisional, thereby giving constitutional effect to what it perceived as an emerging national morality without foreclosing a congressional reconsideration of the Court's judgment. Likewise, the option of a provisional ruling might permit the hesitant Court to respond to the issue of homosexual rights; if the pattern of American moral development is insufficiently clear to permit a final judicial resolution of this problem, surely it is clear enough to permit a provisional decision that gives some type of protection to these rights.[115] The Court said too much in *Roe v. Wade;* it has said too little on homosexual rights. Provisional review could provide the Supreme Court with an important middle ground, one that would permit it to enter the debate without concluding it.

The progressive function of provisional review generally would operate to invalidate state and local policies on which Congress had not yet spoken. Occasionally, however, even congressional action might seem inconsistent with national moral standards. This might be true, for example, if the federal legislation is dated and is no longer in tune with the evolving national morality[116] or if it has been adopted without a full con-

113. *See supra* note 99 and accompanying text.

114. 410 U.S. 113 (1973).

115. *See supra* note 106 and accompanying text.

116. Dean Guido Calabresi has argued that courts should be permitted, as a matter of nonconstitutional doctrine, to update or to induce legislative reconsideration of obsolete statutes. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). Although Calabresi rejects the use of constitutional judicial review as an appropriate means for policing legal obsolescence, *see id.* at 8-30, his nonconstitutional approach roughly approximates my model of provisional constitutional decisionmaking insofar as it involves the review of obsolete federal statutes.

Beyond this similarity, however, our theories and models differ fundamentally. Because his work is limited to the problem of legal obsolescence, Calabresi does not address the broader functions of nonoriginalist judicial review that I have identified. Not surprisingly, therefore, his nonconstitutional model is not well suited to the performance of these functions. Indeed,

sideration of the moral issues at stake.[117] In either situation, the Supreme Court might invalidate the legislation under attack based on Congress' apparent deviation from the nation's morality.[118] Yet it might also be proper for the Court to accept a subsequent congressional reaffirmation of the same policy, if Congress based its reaffirmation on a thorough legislative consideration of contemporary moral values. If so, a provisional invalidation of the federal statute would be the Court's most appropriate action.

Justice Stevens suggested this type of response to congressional legislation in his dissenting opinion in *Fullilove v. Klutznick*.[119] Although a majority of the Supreme Court upheld a minority set-aside requirement in a public works funding measure, Stevens was deeply troubled by Congress' failure to consider the moral implications of compensatory racial discrimination:

> The very fact that Congress for the first time in the Nation's history has created a broad legislative classification for entitlement to benefits based solely on racial characteristics identifies a dramatic difference between this Act and the thousands of statutes that preceded it. This dramatic point of departure is not even mentioned in the statement of purpose of the Act or in the Reports of either the House or the Senate Committee that processed the legislation, and was not the subject of any testimony or inquiry in any legisla-

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Calabresi's model might well frustrate the pursuit of *national* moral progress and the *nationalization* of our society's approach to controversial individual rights issues by reducing the role of the Supreme Court in the review of state and local policies, the "updating" of which would be left largely to the various state courts. *See id.* at 201 n.43 (suggesting that the review of state and local legislation generally would lack a federal constitutional predicate, and that therefore the Supreme Court and other federal courts generally would lack subject-matter jurisdiction in these cases).

117. As Dean Sandalow has argued, "Legislation that has failed to engage the attention of Congress . . . is likely to be the product of partial political pressures that are not broadly reflective of the society as a whole." Sandalow, *Judicial Protection of Minorities,* 75 MICH. L. REV. 1162, 1188 (1977). *Cf.* Easterbrook, *The Supreme Court, 1983 Term—Forward: The Court and the Economic System,* 98 HARV. L. REV. 4, 15 (1984) ("People demand laws just as they demand automobiles, and some people demand more effectively than others."); Perry, *Ethical Function, supra* note 45, 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.").

118. National legal standards can be established by federal administrative action as well as by statute. Such administrative standards are much more likely to deviate from the national morality than are statutory enactments, for *Congress* might not have given *any* consideration to the moral implications of the administrative action. *Cf.* Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976) (invalidating a United States Civil Service Commission regulation that discriminated against resident aliens despite the fact that the Commission's discriminatory employment practice might have been upheld "if the Congress or the President had expressly imposed the citizenship requirement").

119. 448 U.S. 448 (1980).

> tive hearing on the bill that was enacted. It is true that there was a brief discussion on the floor of the House as well as in the Senate on two different days, but only a handful of legislators spoke and there was virtually no debate.[120]

Concerned as he was with Congress' "perfunctory consideration of an unprecedented policy decision of profound constitutional importance to the Nation,"[121] Stevens preferred not to make "a final determination that the substance of the decision" was unconstitutional.[122] Instead, he urged "a more tentative holding of unconstitutionality based on a failure to follow procedures that guarantee the kind of deliberation that a fundamental constitutional issue of this kind obviously merits."[123] Stevens thus would have ruled the congressional legislation provisionally unconstitutional "because it simply raises too many serious questions that Congress failed to answer or even to address in a responsible way."[124]

Provisional judicial review of congressional as well as state and local governmental actions thus could assist the Supreme Court in the performance of its progressive function. Provisional review also could assist the Court in its nationalizing function. Unlike the progressive function of judicial review, the nationalizing function relates exclusively to matters that Congress has not yet addressed and that therefore are subject to divergent state and local policies. Even an obsolete or ill-conceived federal statute, after all, does provide a national policy, which is all the nationalizing function requires.[125] When there is no such federal legislation, however, judicial review can serve its nationalizing function through the recognition of national constitutional standards. Provisional review, moreover, is uniquely well-suited to promoting national standards for the protection of individual rights.

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120. *Id.* at 549-50 (Stevens, J., dissenting) (footnotes omitted).

121. *Id.* at 550.

122. *See id.* at 551.

123. *Id.* at 552.

124. *Id. Cf.* Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting) (arguing that Congress' failure to include a particular group of American Indians in a reparations award was unconstitutionally discriminatory, in part because it was "the consequence of a legislative *accident,* perhaps caused by nothing more than the unfortunate fact that Congress is too busy to do all of its work as carefully as it should") (emphasis in original); Califano v. Goldfarb, 430 U.S. 199, 223 n.9 (1977) (Stevens, J., concurring in the judgment) ("Perhaps an actual, considered legislative choice would be sufficient to allow this [social security statute discriminating on the basis of gender] to be upheld, but that is a question I would reserve until such a choice has been made."). *See generally* Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197 (1976) (suggesting that due process should be construed to require procedural safeguards in the enactment of legislation).

125. The nationalizing function also would be satisfied by a uniform national standard adopted by federal administrative action. *See generally supra* note 118.

Consider again the examples of abortion, homosexual rights, and compensatory racial discrimination. I have argued that provisional constitutional rulings in these areas, at least as to abortion and homosexual rights, would further the progressive function of nonoriginalist judicial review.[126] But even assuming the absence of a discernible pattern of American moral development concerning any of these issues, they nonetheless command national attention and demand national resolution. When Congress fails to provide this resolution, the Supreme Court can do so through the recognition of federal constitutional rights. Although the nationalizing function, standing alone, cannot justify final Supreme Court rulings, it might nonetheless support provisional rulings creating national standards that would remain subject to popular control through congressional action. Thus, even if the American morality concerning abortion, homosexual rights, and compensatory racial discrimination were entirely unclear, the Court could rule provisionally in favor of the protection of individual rights and against the majoritarian actions under attack. In so doing, the Court would be providing immediate national standards on these basic issues without an unduly "final" intrusion on majoritarian policymaking. Indeed, the Court would be promoting congressional consideration of important national issues it had previously ignored, thereby enhancing the effectiveness of the national political process.

I do not mean to suggest that judicial review, in its provisional form or otherwise, is entirely effective in nationalizing our treatment of individual rights issues. The Supreme Court can establish only a minimum national standard for the protection of individual rights. State and local political bodies, or state courts acting under state constitutional provisions, can give more protection to individual rights than the Supreme Court has mandated. Nothing in *Roe v. Wade,*[127] for example, would prevent a state or local policy going beyond the standards that the Court announced for the protection of a woman's right to have an abortion. To the extent that this type of state or local policymaking occurs, the nationalizing effect of the Supreme Court's constitutional rulings is reduced. As a result, the effectiveness of the nationalizing function of judicial review varies with the extent to which the Court adopts a stance sufficiently protective of individual rights that state and local officials are disinclined to provide additional protection.[128] This is true as much for

126. *See supra* text accompanying notes 113-115.

127. 410 U.S. 113 (1973).

128. *Cf.* Oregon v. Elstad, 105 S. Ct. 1285, 1322 & n.44 (1985) (Brennan, J., dissenting) (arguing that recent Supreme Court decisions have been insufficiently protective and that such decisions "are making this tribunal increasingly irrelevant in the protection of individual

the provisional rulings I have described as it is for final constitutional decisions.

In responding to a provisional Supreme Court ruling, however, Congress could adopt a national policy that would completely eliminate the opportunity for state or local deviations.[129] Had *Roe v. Wade* been decided provisionally, for example, Congress might have responded with national legislation regulating the issue of abortion and displacing all contrary state and local policies, whether more or less protective of a right to abortion than the newly enacted national standard. Provisional review therefore is a better vehicle than final review for achieving not merely a minimum national standard for the protection of individual rights, but a uniform national standard that completely resolves the issue. Neither a final nor a provisional constitutional ruling, in itself, can ensure a uniform national standard. A provisional ruling, however, can at least encourage Congress to provide such a standard, one that would eliminate the potential for divergent state and local answers to a problem that should not be subject to geographically disparate resolution.[130]

There is a related constraint on the functional operation of judicial review, including provisional review. The Supreme Court can further the nationalizing function of nonoriginalist review only by recognizing constitutional *limitations* on majoritarian policymaking. This constraint, in turn, directly affects the progressive function of nonoriginalist review, for the type of national answer the Court can provide—one limiting the power of majoritarian officials—might not reflect, and might even frustrate, the developing national morality concerning the issue in question. On the issue of compensatory racial discrimination, for example, the

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rights, and . . . are requiring [state courts and legislatures] to shoulder the burden"). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

129. I do not mean to suggest that in the absence of any Supreme Court ruling, Congress would lack the constitutional power to adopt such a national policy (subject, of course, to judicial review). *See infra* note 161 (discussing the broad sweep of Congress' legislative powers).

130. To say that Congress could provide a national legal standard is not to say that such a standard necessarily would eliminate the potential for disparity within the limits of the congressional legislation. To draw an example from the area of homosexual rights, suppose that Congress has decided to respond to a provisional Supreme Court decision holding that public school systems cannot lawfully discriminate against homosexuals in the selection of elementary school teachers. After full deliberation, Congress might conclude that homosexuality is a legitimate ground for discrimination in this context, but it would be unlikely to conclude that such discrimination should in some way be *mandated.* Thus, the congressional legislation might provide that "it shall not be unlawful" for any school system to discriminate in this way. Such legislation would reflect a national moral judgment and would provide a national legal standard, but it nonetheless would permit individual school officials to decide whether or not to discriminate in the manner authorized by Congress.

Court could set a national standard by finally or provisionally invalidating state and local policies that call for such discrimination, but it could not declare, to the contrary, that such policies must be the national norm. Although I believe that the American morality concerning compensatory racial discrimination is in flux,[131] it may be that emerging national values will support such discrimination. A national judicial standard, therefore, would come only at the cost of potentially disserving the progressive function of nonoriginalist review, for the Court could provide a national answer only by imposing limitations on governmental practices that in fact might further a developing national morality.

As a result of this problem, the Supreme Court ordinarily should not recognize constitutional rights in order to serve the nationalizing function of nonoriginalist review unless there is at least some evidence that the recognition of such rights would also serve, or at least not disserve, the progressive function as well. A provisional constitutional ruling, however, would decidedly reduce the risk of frustrating the developing American morality, for Congress could step in to authorize whatever majoritarian policies the Court had provisionally rejected. Thus, at least when the need for a national resolution is especially acute, as perhaps is true for the problem of compensatory racial discrimination, the Court properly could make a provisional ruling that might err on the side of protecting individual rights,[132] knowing that its decision could readily be replaced by a new national standard of Congress' own making.[133]

None of this is to say that uniform national standards are always desirable. Especially when issues of individual rights are in their early stages of development, state and local officials, both political and judicial, as well as the lower federal courts, can make important contributions to the national dialogue.[134] But after such issues have fermented and ma-

131. *See supra* text accompanying note 108.

132. By this I mean that the Court properly might err on the side of recognizing provisional constitutional limitations on the operation of state and local government. In some sense, of course, there are "individual rights" on both sides of issues such as abortion and compensatory racial discrimination. *Cf.* Maltz, *The Dark Side of State Court Activism,* 63 TEX. L. REV. (forthcoming, page proofs at 312-16) (arguing that the adjudication of "individual rights" in fact involves the *distribution* of legal rights among various claimants).

133. *Cf.* Monaghan, *The Supreme Court, 1974 Term—Forward: Constitutional Common Law,* 89 HARV. L. REV. 1, 29 (1975) ("Extending individual liberty on a common law basis . . . triggers an important shift in the political process. The Court, in effect, opens a dialogue with Congress, but one in which the factor of inertia is now on the side of individual liberty.") (footnote omitted). *See generally infra* note 143.

134. Indeed, state courts may possess a greater competence than their federal counterparts in evaluating the constitutionality of certain legal doctrines. *See* Sowle & Conkle, *Comparative Negligence Versus the Constitutional Guarantee of Equal Protection: A Hypothetical Judicial*

tured, at least when the issues are highly controversial, a national resolution eventually should prevail. The issues of abortion, homosexual rights, and compensatory racial discrimination seem to have reached this stage. The consideration of other issues, however, might profit from continuing debate at the state and local levels.[135]

B. A "Modest" Proposal?

In suggesting that the Supreme Court abandon the doctrine of judicial finality in certain constitutional cases, I have proposed a very basic revision in the practice of judicial review. Yet I have asserted that this proposal is "modest." In partial support of that assertion, I already have noted the "provisional review" that the Court presently exercises under the Commerce Clause,[136] and I have discussed the provisional approach advocated by Justice Stevens for certain cases involving individual rights.[137] In the remainder of this Article, I shall further explain the modesty of my proposal by identifying additional precursors in the Supreme Court's practice and doctrine and by emphasizing the limited nature of my suggestion.

In the exercise of judicial review, the Supreme Court sometimes invalidates majoritarian actions without rendering final substantive decisions on the underlying issues of individual rights, thereby mitigating the doctrine of judicial finality by permitting majoritarian officials to recon-

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Decision, 1979 DUKE L.J. 1083, 1105-08 (arguing that state court judges have a special competence in evaluating constitutional challenges within the realm of tort law).

135. I have recognized that a national legal standard adopted by Congress in response to a provisional constitutional ruling might permit a continued diversity in the conduct of state and local officials. *See supra* note 130. Perhaps I should go one step further and concede that Congress should be permitted to avoid making any national moral judgment at all by simply declaring the issue in question to be one for state and local resolution. *See* Dimond, *supra* note 111, at 232 ("As the representative body for all the people, Congress should be free to determine by ordinary legislation whether a national standard or diverse state responses should govern."). This would give Congress the ultimate authority to decide whether the issue demanded a national legal standard, and it would mitigate any federalism-based objection to the model of judicial review that I have proposed. *Cf.* Wechsler, *supra* note 78 (arguing that the states can protect their own interests in the national political process). I am reluctant to make such a concession, however, for it would significantly impede the nationalizing function of provisional review. *See supra* notes 75-89 and accompanying text. The more highly controversial the issue of individual rights, the more important its national resolution. Yet the very existence of controversy might well induce Congress to avoid such a resolution if it could sidestep the issue by passing it back to state and local decisionmakers.

136. *See supra* note 112 and accompanying text. Professor William Cohen has argued that Congress' power under the Commerce Clause should be read to exemplify a broader principle: that Congress can validate any policy adopted by a state if Congress itself could constitutionally adopt that policy. *See* Cohen, *Congressional Power to Validate Unconstitutional State Laws: A Forgotten Solution to an Old Enigma,* 35 STAN. L. REV. 387 (1983).

137. *See supra* notes 119-124 and accompanying text.

sider, and perhaps readopt, the same substantive policies. These rulings involve what might be called "structural" or "procedural" judicial review, and include, for example, rulings based on the constitutional doctrines governing legislative delegation, vagueness, and overbreadth.[138] When the Supreme Court invalidates majoritarian actions on these structural or procedural grounds, it may signal its disfavor with the substantive policies under attack without imposing final decisions on the constitutional merits of those policies.[139] In its consideration of the death penalty, for example, the Court initially invalidated the penalty on grounds that were essentially procedural,[140] thereby permitting legislatures to readopt the penalty—with procedural modifications—in response to the Court's decision.[141] In so doing, the Court temporarily ended the death penalty and forced its reconsideration by legislative officials, but left to those officials the final authority to determine whether capital punishment should remain a part of the American system of justice.[142] The Court's constitutional jurisprudence thus already includes structural and procedural judicial review, judicial review that, in some

138. *See* Wellington, *The Nature of Judicial Review,* 91 YALE L.J. 486, 504-09 (1982).

139. *Cf.* A. BICKEL, *supra* note 46, at 176 ("[A]n initial series of inconclusive dispositions will often provoke the Justices to reflect out loud, as it were, about approaches to an enduring solution, without as yet assuming responsibility for imposing one."); Kronman, *Alexander Bickel's Philosophy of Prudence,* 94 YALE L.J. 1567, 1587 (1985) ("By offering a partial or reversible solution to a constitutional problem, a solution that bespeaks its own uncertainty regarding the principle or principles involved, the Court invites the other branches of government and the public, to rise to a consideration of principle and address the problem in the same spirit.").

140. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam) (holding that "the imposition and carrying out of the death penalty" under its then-prevalent arbitrary and random administration constituted cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states through the Fourteenth Amendment).

141. *See, e.g.,* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

142. *Cf.* Gregg v. Georgia, 428 U.S. 153, 179-81 (1976) (plurality opinion) ("The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.... [A]ll of the post-*Furman* statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people."). A more deliberative and thoughtful majoritarian response to *Furman* might have resulted had the Court made a provisional ruling of the type I have suggested, for only *Congress,* and not the individual states, could have reinstated the penalty in response to such a ruling. *See generally* C. BLACK, *supra* note 46, at 40 (suggesting that "you can whoop and holler" legislation through many state legislatures even when similar legislation would stand little chance of passing in Congress).

Not all of the Court's death penalty jurisprudence has been limited to structural or procedural judicial review. The Court has ruled, for example, that death is an unconstitutionally disproportionate punishment for the crime of raping an adult woman, thereby precluding any substantive judgment by legislators to the contrary. *See* Coker v. Georgia, 433 U.S. 584 (1977).

sense at least, is "plainly non-final."[143]

Even when the Court renders substantive constitutional rulings that it intends to be final, its rulings are not immune from criticism[144] and indirect attacks by majoritarian officials, and these majoritarian responses to the Court's decisions may induce the Court to reevaluate its own "final" rulings.[145] The Court's "considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases"[146] permits it to consider majoritarian sentiments that otherwise would be quelled by the doctrine of judicial finality.[147] The majoritarian response to *Roe v. Wade,*[148] for example, might eventually lead the Court to retreat from that holding.[149]

143. Wellington, *supra* note 138, at 504. The Supreme Court also can question the constitutional validity of substantive policies without making final constitutional rulings by interpreting federal statutes so as to render them free from constitutional doubt. *See* A. BICKEL, *supra* note 46, at 164-66, 201-02. Likewise, through the use of what Professor Henry P. Monaghan has called "constitutional common law," the Court can implement its basic constitutional doctrine with subconstitutional rules that may be subject to congressional modification. *See generally* Monaghan, *supra* note 133, at 2-3 (arguing that much of what passes for authoritative constitutional doctrine "is best understood as something of a quite different order—a substructure of substantive, procedural, and remedial rules drawing their inspiration and authority from, but not required by, various constitutional provisions; in short, a constitutional common law subject to amendment, modification, or even reversal by Congress").

144. *See supra* note 16 and accompanying text.

145. *Cf.* Dimond, *supra* note 111, at 234-35 ("[T]he Court's binding decisions have not always proven final. They posit provisional answers that the people eventually accept or the Court modifies or rejects.").

146. Glidden Co. v. Zdanok, 370 U.S. 530, 543 (1962) (plurality opinion).

147. *Cf.* Smith v. Allwright, 321 U.S. 649, 665 (1944) ("In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions."); Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-07 (1932) (Brandeis, J., dissenting) ("[I]n cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions."). *See generally* City of Oklahoma City v. Tuttle, 105 S. Ct. 2427, 2434 n.5 (1985) (plurality opinion) ("We see no reason here to depart from the important and established principle of stare decisis. The question we address involves only statutory construction, so any error we may commit is subject to reversal by Congress.").

148. 410 U.S. 113 (1973).

149. According to John Agresto, "The most obvious example of congressional attempts to minimize the impact of a particular decision is the body of legislation that was passed in response to the Court's abortion decrees." J. AGRESTO, *supra* note 5, at 130.

> Congress had forbidden Medicaid payments for certain types of abortions, banned the use of funds for abortions as a method of family planning under the Foreign Assistance Act, banned fetal research, prohibited Legal Service attorneys from handling abortion-related cases, and passed a "conscience clause" amendment to the Hill-Burton Act indicating Congress' continuing financial support for any hospital, public or private, which refuses on the basis of religious or moral belief to perform abortions. Many of these acts will come before the Court, and there they may be overturned. But that fact in no way derogates from Congress' constitutional ability, as an equal and independent branch of government, to enter into this type of consti-

The doctrine of judicial finality thus is already subject to important qualifications. Although the Supreme Court claims the final word in constitutional adjudication, it sometimes acts without expressing a final substantive position, and it likewise may revise its substantive judgments in reaction to majoritarian opinion. As a result, the doctrine of judicial finality does not always foreclose majoritarian officials from responding effectively to constitutional invalidations with which they disagree. My proposal to further limit the finality of judicial review therefore is not as radical as it might seem, for the ground has already been broken.

Beyond these existing limitations on the doctrine of judicial finality, there is more direct precedential support[150] for my proposed model of provisional judicial review, a model that would give Congress a special role in defining the content of national constitutional rights. Section 5 of the Fourteenth Amendment expressly authorizes Congress "to enforce, by appropriate legislation," the provisions of that amendment,[151] and the

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tutional dialogue with the Court, through legislation, on matters of vital national concern. The more important the issue, in fact, the more necessary the dialogue.

Id. at 130-31 (footnotes omitted). Agresto argues that *Roe v. Wade* and other constitutional decisions are not as final as they appear because Congress, in effect, can force the Supreme Court to reconsider its constitutional rulings. *See id.* at 125-31. *See also* Fisher, *Constitutional Interpretation by Members of Congress,* 63 N.C.L. REV. 707, 744-46 (1985). *Cf.* Wellington, *supra* note 138, at 502-04 (arguing that constitutional decisionmaking is not always more "final" than statutory interpretation).

The most recent majoritarian attack on *Roe* has taken the form of a specific request by the Reagan administration for the Supreme Court to overrule its decision in that case. Filing an amicus brief in two abortion cases currently pending before the Court, the administration has argued that "the textual, doctrinal and historical basis for *Roe v. Wade* is so far flawed and . . . is a source of such instability in the law that this Court should reconsider that decision and on reconsideration abandon it." Brief for the United States an Amicus Curiae in Support of Appellants at 2, filed jointly in Thornburgh v. American College of Obstetricians & Gynecologists, 105 S. Ct. 2015 (1985), *on appeal from* 737 F.2d 283 (3d Cir. 1984), and Diamond v. Charles, 105 S. Ct. 2356 (1985), *on appeal from* Charles v. Daley, 749 F.2d 452 (7th Cir. 1984). Among its other arguments, the administration contends that *Roe* cannot be defended as a decision based on developing societal values: "The story traced by the Court does not show a steady and growing acceptance of a point of view until the practice in a few jurisdictions can be characterized as anomalous." *Id.* at 27. *See supra* note 101 and accompanying text. *See generally U.S. Brief Asks Court to Reverse Abortion Ruling: Administration Seeking to Undo 1973 Ruling,* N.Y. Times, July 16, 1985, at 8, col. 1.

Despite the administration's position, there is no indication that the Court is prepared to overrule its decision in *Roe.* Indeed, during the oral arguments in the pending abortion cases, the Justices' questions focused largely on procedural issues. *See Arguments Before the Court,* 54 U.S.L.W. 3356 (1985).

150. "Precedential support," in this context, is not limited to direct holdings by the Supreme Court, but includes statements of dicta as well as statements embraced by less than a majority of the Justices. The Court frequently relies on these various sources of authority, and it is therefore appropriate to identify them as potential building blocks for the recognition of a new constitutional doctrine.

151. *See* U.S. CONST. amend. XIV, § 5.

Supreme Court has recognized that this section gives Congress some power to define the scope of the amendment's guarantees of individual rights. In the leading case of *Katzenbach v. Morgan,*[152] the Court held that Congress could act under section 5 to prohibit the enforcement of state laws that the Court would not necessarily have invalidated directly under the Equal Protection Clause.[153] Although *Katzenbach* involved congressional legislation that *extended* the reach of the Fourteenth Amendment's prohibitions on state action, there also have been suggestions of a congressional power to *restrict* the reach of the amendment by authorizing majoritarian actions that the Court otherwise would find unconstitutional. In *Fullilove v. Klutznick,*[154] for example, the plurality opinion relied heavily on Congress' section 5 power[155] in upholding a compensatory racial classification that the Court might well have invalidated had it been adopted by a state acting without congressional approval.[156] Most recently, the Court has gone so far as to suggest in dicta that it devises Fourteenth Amendment standards only in the absence of "controlling congressional direction."[157]

To be sure, the Court sometimes has construed Congress' power more narrowly,[158] and the controlling doctrine under section 5 therefore

152. 384 U.S. 641 (1966).

153. *See id.* at 648-50. The Court stated that section 5 "grant[ed] to Congress, by a specific provision applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause, Art. I, § 8, cl. 18." *Id.* at 650. *See also id.* at 668 (Harlan, J., dissenting) ("In effect the Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the *substantive* scope of the Amendment.") (emphasis in original).

154. 448 U.S. 448 (1980).

155. *See id.* at 476-78.

156. In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), only four Justices indicated a general willingness to uphold state-adopted compensatory racial classifications. *See id.* at 324-79 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part). By the time *Fullilove* was decided two years later, the number apparently had been reduced to three. *See* Fullilove v. Klutznick, 448 U.S. 448, 517-22 (1980) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in the judgment).

157. *See* City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249, 3254 (1985) ("Section 5 of the Amendment empowers Congress to enforce [the Equal Protection Clause], but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection.").

158. In Oregon v. Mitchell, 400 U.S. 112 (1970), for example, although the Court upheld a number of provisions in the Voting Rights Act Amendments of 1970, it refused to recognize a congressional power under section 5 to extend the franchise to eighteen-year-olds in state and local elections. *See id.* at 117-18 (Black, J., announcing the judgment of the Court). Indeed, in *Katzenbach* itself, the Court had stated that "Congress' power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966). In Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), the Court relied upon this language from *Katzenbach* in rejecting an argument that Mississippi's opera-

is very much in doubt.[159] Nonetheless, there is precedential support for some congressional role in determining the extent to which individual rights should be constitutionally protected under the Fourteenth Amendment.[160] This amendment— either standing alone or as a vehicle for "incorporating" Bill of Rights norms for application to *state*, as opposed to federal, governmental action—provides the textual basis for a substantial majority of the Supreme Court's decisions protecting individual rights. In all such cases, the Court could utilize a jurisprudence derived from section 5 in adopting my suggested model of provisional review. Even in those few cases in which a provisional ruling might be appropriate outside the realm of the Fourteenth Amendment, the Court would not be entirely without precedential support in adopting a provisional method of decision.[161] Indeed, the Fourteenth Amendment has such an over-

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tion of a women-only nursing school might have been authorized by congressional legislation. *See id.* at 732-33 ("Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment.").

159. For a general discussion of Congress' power under section 5 and under comparable provisions of the Thirteenth and Fifteenth Amendments, see Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments,* 67 MINN. L. REV. 299 (1982). *See generally* Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation,* 68 VA. L. REV. 333 (1982).

160. In addition to the Court's interpretations of section 5, there are other cases indicating that special deference should be given to Congress when the Court considers the constitutionality of federal statutes, even when those statutes, if adopted by a state, might be subject to invalidation under the Fourteenth Amendment. Relying on Congress' power over immigration and naturalization, for example, the Court typically upholds federal classifications that disadvantage aliens even though similar state classifications are likely to be invalidated under the Equal Protection Clause. *Compare* Mathews v. Diaz, 426 U.S. 67 (1976) *with* Graham v. Richardson, 403 U.S. 365 (1971). More generally, the Court has suggested that when it evaluates an Act of Congress that has been challenged on equal protection grounds, it "accords 'great weight to the decisions of Congress,' " especially when Congress has "specifically considered the question of the Act's constitutionality." *See* Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (quoting Columbia Broadcasting Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 102 (1973)).

161. *See, e.g.,* Hampton v. Mow Sun Wong, 426 U.S. 88, 105 (1976) (finding a United States Civil Service Commission regulation that discriminated against resident aliens to be unconstitutional under the Fifth Amendment, but suggesting that the same regulation might be upheld "if the Congress or the President . . . expressly imposed the citizenship requirement"). *See also* Fullilove v. Klutznick, 448 U.S. 448, 548-54 (1980) (Stevens, J., dissenting) (indicating that he would invalidate the compensatory racial classification under review as a violation of the Fifth Amendment, but that he would leave open the issue of whether such a classification could be readopted after appropriately thorough congressional consideration); Califano v. Goldfarb, 430 U.S. 199, 223 n.9 (1977) (Stevens, J., concurring in the judgment) (suggesting that a "considered legislative choice" by Congress might justify the gender-based classification that he found to be unconstitutional under the Fifth Amendment). *Cf.* Welsh v. United States, 398 U.S. 333, 371-72 (1970) (White, J., dissenting) (arguing that the Supreme Court should respect congressional judgments accommodating free exercise and establishment considerations under the religion clauses of the First Amendment). *See generally supra* notes

whelming influence on the Court's constitutional doctrine that decisions interpreting the amendment, including those interpreting section 5, may be relevant even when the amendment is not directly applicable.[162] In sum, the Court could readily build upon its section 5 jurisprudence in adopting my proposed model of provisional review.[163]

138-143 and accompanying text (discussing Supreme Court rulings that reflect "structural" or "procedural" judicial review).

In identifying a source of congressional power to provide national standards governing issues of individual rights, the Court of course would not be limited to section 5 of the Fourteenth Amendment. The Court's Commerce Clause decisions, for example, have construed Congress' power so expansively that the notion that Congress holds only a limited number of constitutionally enumerated powers has become little more than a fiction. *See* Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring in the judgment). *See also, e.g.,* Garcia v. San Antonio Metro. Transit Auth., 105 S. Ct. 1005 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)), in which the Supreme Court had recognized a Tenth Amendment limitation on Congress' power to regulate state and local governmental entities); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as within Congress' power under the Commerce Clause). Congress' spending power might be particularly well suited to the task of providing national legislative standards to govern questions of individual rights. *See* Lupu, *supra* note 43, at 1049 n.323. *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 473-80 (1980) (plurality opinion) (discussing the relationship among Congress' commerce power, its spending power, and its power under section 5 of the Fourteenth Amendment).

162. *Cf.* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (suggesting that "it would be unthinkable" not to apply Fourteenth Amendment equal protection standards under the Fifth Amendment's Due Process Clause); Fullilove v. Klutznick, 448 U.S. 448, 551-52 (1980) (Stevens, J., dissenting) ("If the general language of the Due Process Clause of the Fifth Amendment authorizes this Court to review Acts of Congress under the standards of the Equal Protection Clause of the Fourteenth Amendment—a clause that cannot be found in the Fifth Amendment—there can be no separation-of-powers objection to a more tentative holding of unconstitutionality. . . ."). *See generally* J. AGRESTO, *supra* note 5, at 133 ("Our full understanding of the extent of congressional power under section 5 of the Fourteenth Amendment . . . is only now starting to be worked out.").

163. The enhanced congressional role that I have suggested might draw the Fourteenth Amendment closer to its historical foundations, for there is evidence that the framers of the amendment "were primarily interested in augmenting the power of Congress, rather than the judiciary." Katzenbach v. Morgan, 384 U.S. 641, 648 n.7 (1966). Indeed, the framers apparently viewed the judiciary with considerable suspicion:

> [T]he Radicals did not trust the judiciary in general and the Supreme Court in particular, either before or after the passage of the resolution submitting the proposed amendment to the states. . . .
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> . . . The Court was denounced as a refuge for treason and a usurper, basing its opinions on policy and not law, and numerous bills, two of which passed, were introduced to curtail and even abolish the appellate jurisdiction of the Court and to diminish its membership. On one occasion the irrepressible Bingham even suggested the possibility of reducing the number of justices to three, and appeared generous in stopping there.

R. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 53-55 (1960). *Cf.* J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 17, at 837-38 ("There was simply no reason for the framers to anticipate a Court which would liberally recognize individual rights more expansively than the Congress . . ."). *But cf.* Burt, *Miranda and Title II: A Morganatic Marriage,* 1969 SUP. CT. REV. 81, 95 ("[I]n 1865 and 1866,

In evaluating the modesty of my proposal, it also is important to bear in mind its limited nature. I am not arguing, as has Dean Terrance Sandalow, that the Supreme Court's protection of individual rights should always give way to deliberate and broadly based majoritarian decisions.[164] Nor am I suggesting, as has Professor Paul R. Dimond, that Congress should be given a general power to overturn broad classes of the Court's constitutional decisions.[165] Rather, I contend only that the Supreme Court should use the *option* of provisional review in selected

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there was every reason for the supporters of the Fourteenth Amendment to look confidently toward the judiciary."). *See generally* Farber & Muench, *supra* note 39, at 236 ("The Fourteenth Amendment was intended to bridge the gap between positive law and higher law by empowering the national government to protect the natural rights of its citizens.").

164. Writing in what might be characterized as a tentative essay, Dean Sandalow has argued that constitutional law must be seen to evolve in response to changing societal values, and that there is no better available statement than that of Congress concerning the present state of our evolving social morality. *See* Sandalow, *supra* note 117, at 1179-81, 1182. As a result, Sandalow contends that congressional legislation should be deemed to provide controlling constitutional standards. *See id.* at 1186-87, 1189-90. Somewhat more cautiously, he also suggests that legislation recently enacted by most of the states might properly be treated the same way. *See id.* at 1186-87, 1194. In order to attain this authoritative constitutional status, however, the legislative decisions of Congress or of the states would have to reflect "deliberate and broadly based" political judgments. *See id.* at 1188. Thus, Sandalow's argument "calls for judicial submission only to decisions that have been deliberately made by Congress and, perhaps also, to decisions expressed in legislation adopted by most states." *Id.* at 1190.

The basic thrust of Sandalow's argument is sound and, indeed, is consistent with much of what I say here. But Sandalow paints with too broad a brush in contending that the Supreme Court always should yield to majoritarian decisions of the type he describes. Such an argument ignores the role of *emerging* (but not yet generally accepted) societal values as a source of constitutional norms and ignores the possibility that judicial review, in certain applications, may perform functions that are not well served by deference to a national legislative consensus. *See infra* notes 168 & 171-172 and accompanying text. Although Sandalow does not fully delineate the ramifications of his theory for the doctrine of judicial finality, the theory would appear to suggest that every Supreme Court decision protecting individual rights should be subject to reversal by deliberate congressional legislation (and perhaps by deliberate legislation adopted by a majority of the states). Such a position goes far beyond what I advocate in this Article.

165. In a recent article that he labels "exploratory," Professor Dimond has set forth a model of judicial review under which Supreme Court decisions would bind the states but "would not bind Congress except when based on the largely process-oriented and representation reinforcing limits imposed directly on Congress by the Constitution." *See* Dimond, *supra* note 111, at 202. These "direct" constitutional restraints would consist primarily of the limits stated in section 9 of Article I and in the first eight amendments to the Constitution, with the Due Process Clause of the Fifth Amendment being "understood solely as a procedural limit." *See id.* at 202 n.3, 223, 230. Expressing a sentiment similar to Sandalow's call for "deliberate" legislative decisionmaking, *see supra* note 164, Dimond would insist that "any congressional action modifying or reversing Court decisions . . . address[ ] the merits." *See* Dimond, *supra* note 111, at 202, 230-31. Focusing especially on the Privileges or Immunities Clause of the Fourteenth Amendment, which limits state but not congressional power, Dimond argues that his model is authorized, although not compelled, by the text and structure of the Constitution. *See id.* at 218. *See also id.* at 209-29. He also discusses the impact of his model on congres-

individual rights cases. I thus would leave to the Court, not to Congress, the determination of which constitutional rulings would be subject to congressional modification. In an appropriate case, the Court would announce the provisional nature of its ruling; absent such announcement, the Court's constitutional decisions would have their traditional, "final" effect. Under this model, the Court would remain the "ultimate interpreter of the Constitution"[166]—indeed, a more powerful and effective interpeter, given the addition of a new and important jurisprudential tool that would supplement, not replace, the Court's traditional practice of final judicial review.

Perhaps the Court should use provisional review in a large number of its decisions protecting individual rights. If the role of the Court is to promote national standards that reflect American societal values, one could argue Congress always is a superior institution for making the ultimate decision on what those standards should be.[167] But the progressive function of nonoriginalist review does not permit provisional rulings in every case. When the evolving pattern of American moral development is clear, the Court properly may recognize constitutional rights on the basis of *emerging* national values that have not yet gained societal acceptance, and that therefore might not hold sway in congressional deliberations.[168] Moreover, congressional legislation does not always reflect even the nation's *contemporary* values concerning issues of individual rights.[169] As a result, the Supreme Court should not always use provisional review. Further, the Court must retain the authority to invalidate, on appropriate grounds, any congressional legislation that is adopted in response to an initial, provisional ruling by the Court.[170]

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sional enforcement acts under the post-Civil War amendments and on constitutional doctrine protecting substantive rights and "anti-caste" principles. *See id.* at 232-38.

Like Sandalow, Dimond offers many important insights that complement what I say in this Article. Of special note is his attempt to demonstrate that a provisional mode of judicial decisionmaking need not disserve the "representation-reinforcing" function of judicial review posited by Dean John Hart Ely, *see supra* note 110 and accompanying text. *See generally infra* text accompanying notes 171-172. Nonetheless, also like Sandalow and for similar reasons, Dimond is wrong to define the congressional role in constitutional interpretation as broadly as he does. *See supra* note 164. It therefore is not surprising that Dimond himself is reluctant to embrace the model that he has drawn. *See* Dimond, *supra* note 111, at 203, 239-40.

166. Powell v. McCormack, 395 U.S. 486, 549 (1969); Baker v. Carr, 369 U.S. 186, 211 (1962).

167. *Cf.* C. BLACK, *supra* note 46, at 41 ("As to issues of *national* consensus, the presumption has to be that Congress is the empowered voice.") (emphasis in original).

168. The most important example of such a case is Brown v. Board of Educ., 347 U.S. 483 (1954). *See supra* text accompanying note 91. *See also* Conkle, *supra* note 6, at 635.

169. *See supra* notes 117-124 and accompanying text.

170. The Court's review of such congressional legislation ordinarily would not include a substantive reconsideration of the very issue that the Court had invited Congress to address.

Despite these caveats, provisional review would seem well suited to the Court's progressive and nationalizing functions in a large number of the cases in which the Court is asked to invalidate state or local governmental actions. I remain reluctant, however, to advocate a widespread use of my model. Nonoriginalist review may serve functions beyond those that I have indentified,[171] and such functions might be frustrated by anything less than final judicial review.[172] An overuse of provisional review, moreover, might reduce the force of all of the Supreme Court's constitutional opinions. While provisional rulings of the sort I have proposed would require the Court to concede the nonoriginalist nature of its decisionmaking process, that in itself should not be reason for concern.[173] For the Court to recognize a broad new role for *Congress,* however, might work to undercut the Court's preeminent, if plainly nonoriginalist, role in identifying and articulating our nation's constitutional values.[174]

But it would permit the Court to ensure that Congress gave adequate consideration to the issue, which is itself a form of provisional review. *See supra* notes 116-124 and accompanying text. The Court likewise could resolve any separate constitutional question that might be presented by the legislation.

171. *See supra* note 110 and accompanying text.

172. Perhaps the basic functions of nonoriginalist review vary in different types of individual rights cases. If so, the selective use of provisional review would nonetheless be appropriate when the progressive and nationalizing functions of nonoriginalist review form the primary basis for the Supreme Court's constitutional decisionmaking. These functions seem clearly to predominate, for example, in the Court's substantive due process, equal protection, and Eighth Amendment cases. It may be that other functions, however, have special importance in other areas. *Cf.* Blasi, *The Pathological Perspective and the First Amendment,* 85 COLUM. L. REV. 449, 450 (1985) ("[T]he speech, press, and assembly clauses of the First Amendment, as well as some other provisions of the Constitution—the religion clauses and the dormant Commerce Clause come to mind—are best viewed as having primarily a preservative function.").

173. Although the Supreme Court generally has been reluctant to admit the nonoriginalist nature of its decisionmaking, it has done so—in one way or another—in a number of constitutional cases. *See* Conkle, *supra* note 6, at 639-48. Judicial candor, moreover, is a necessary condition for the legitimate exercise of judicial review, *see id.* at 657-58, 663, and a fear of candor therefore cannot be pressed as a valid reason for rejecting the option of provisional rulings.

174. Professor Robert A. Burt has argued that any suggestion by the Supreme Court

> that Congress has, to whatever degree, an "independent" role in interpreting the Constitution . . . is likely to remove an important restraint on Congress which has, in the past, usually counseled great wariness in trespassing on the Court's prerogatives. . . . [The Supreme Court] will have surrendered, in part at least, one of the Court's most potent institutional weapons: the authoritative tone of its constitutional *ipse dixit.*

Burt, *supra* note 163, at 133-34. *But cf. id.* at 134 (noting that "these dangers may be overstated"); Dimond, *supra* note 111, at 237 ("[T]he mantle of binding finality . . . might be replaced by honest recognition that the Court can act as a forum of principle, searching for right answers or the best instincts of the evolving national conscience."). *See generally* Conkle, *supra* note 6, at 660-61 (noting the risks of a broad congressional role in considering jurisdiction-limiting legislation based on the merits of particular Supreme Court decisions).

Accordingly, my proposal, like any change in a basic governmental practice, should be implemented with caution.

At least initially, I would urge the Supreme Court to use provisional review only when the need for a national answer is great[175] and when the pattern of American moral development does not itself provide sufficient guidance for the Court to recognize a "final" constitutional right.[176] I admit that these criteria are imprecise. I contend, for example, that the relevant pattern of American moral development was sufficiently clear at the time of *Brown v. Board of Education*[177] that the case properly was decided as a final judicial decision,[178] but that the relevant pattern at the time of *Roe v. Wade*[179] was substantially less clear, to the point that the Court would better have acted provisionally.[180] Some would disagree with that assessment. But the fact that standards may be imprecise and subject to differing interpretations is not necessarily a reason for rejecting them. All constitutional standards call for the exercise of judgment—these no more so than others.[181]

I have identified three fundamental issues—abortion, homosexual rights, and compensatory racial discrimination—that would be likely subjects for provisional review.[182] Each of these issues is currently pending before the Supreme Court.[183] There may be other issues that also

175. Or when, on a fundamental issue of the type requiring a national resolution, there is an existing national "answer" that is either obsolete or the product of inadequate congressional consideration. *See supra* notes 116-124 and accompanying text.

176. Thus, in the exercise of provisional review, as in the exercise of final review, the Court must be satisfied that the functional utility of judicial intervention is sufficient to overcome the general presumption of deference to the majoritarian decision under attack. *See generally* Conkle, *supra* note 6, at 663-64 (discussing the importance of judicial restraint).

177. 347 U.S. 483 (1954).

178. *See supra* text accompanying note 91. *See also* Conkle, *supra* note 6, at 635.

179. 410 U.S. 113 (1973).

180. *See supra* notes 98-103 & 113-114 and accompanying text. This distinction between *Brown* and *Roe* rests in part on the rather obvious moral appeal of the principle that the Court was asked to endorse in *Brown,* at least when compared to the moral complexities of the competing considerations that confronted the Court in *Roe. Cf.* A. BICKEL, *supra* note 46, 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.").

181. Are my criteria less precise than the various standards of constitutional decisionmaking advocated by other legal scholars? *See generally* Wiseman, *The New Supreme Court Commentators: The Principled, the Political, and the Philosophical,* 10 HASTINGS CONST. L.Q. 315 (1983). Are they less precise than the standards that actually guided the Court's decision in *Roe,* whatever those (unarticulated) standards might have been?

182. *See supra* notes 98-110, 113-115, & 126 and accompanying text.

183. In Thornburgh v. American College of Obstetricians & Gynecologists, 105 S. Ct. 2015 (1985), *on appeal from* 737 F.2d 283 (3rd Cir. 1984), and Diamond v. Charles, 105 S. Ct. 2356 (1985), *on appeal from* Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), the Supreme Court has been asked by the Reagan administration to overrule the Court's landmark abortion decision in Roe v. Wade, 410 U.S. 113 (1973). *See supra* note 149. Rather than take that step, the

would justify an invocation of provisional review.[184] If not, however, we need only await the passage of time.[185]

Conclusion

In this Article, I have proposed a model of provisional judicial review that would serve to supplement the traditional model of final review.[186] Although I call only for a modest revision in the Supreme Court's institutional practice, it would be an important revision nonetheless, one that would facilitate the Court's performance of what may be the two most critical functions of nonoriginalist judicial review—furthering American moral progress and providing national resolutions for highly controversial issues of individual rights. Unlike the Court's existing practice, which does permit some "non-final" judicial decisions,[187] my proposal would allow the Court to focus directly and candidly on the factors that ought to guide its decisionmaking. My model also would reduce the tension between nonoriginalist judicial review and the principle of majoritarian consent by permitting an enhanced congressional role

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Court might better consider the possibility of *modifying Roe* so as to make it provisional in nature, and thereby subject to congressional reconsideration.

In the area of homosexual rights, the Court has before it the issue of whether constitutional protection should be extended to consensual homosexual relations, notwithstanding the Court's earlier refusal to extend such protection in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975). *See* Bowers v. Hardwick, 106 S. Ct. 342 (1985), *granting cert. to* 760 F.2d 1202 (11th Cir. 1985). *See also supra* notes 104 & 107. If my argument has merit, the Court should at least grant provisional constitutional protection to the rights that are being asserted.

The Court also has the opportunity to adopt a provisional ruling disfavoring compensatory racial discrimination in the absence of congressional action. *See* Wygant v. Jackson Bd. of Educ., 105 S. Ct. 2015 (1985), *granting cert. to* 746 F.2d 1152 (6th Cir. 1984). *See also* Local 28 v. Equal Employment Opportunity Comm'n, 106 S. Ct. 58 (1985), *granting cert. to* Equal Employment Opportunity Comm'n v. Local 638, 753 F.2d 1172 (2d Cir. 1985); Local No. 93, International Assoc. of Firefighters v. City of Cleveland, 106 S. Ct. 59 (1985), *granting cert. to* Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985). *See generally supra* note 108. The Court's existing doctrine on this type of discrimination is unsettled. To the extent that precedent does exist, it would not preclude—and indeed might support—a provisional ruling of the type I have proposed. *See supra* notes 154-156 and accompanying text. *See also supra* text accompanying notes 119-124.

184. The death penalty would seem a likely candidate, or at least it might have been in 1972 when the Court decided Furman v. Georgia, 408 U.S. 238 (1972). *See generally supra* notes 140-142 and accompanying text.

185. *Cf.* Weems v. United States, 217 U.S. 349, 373 (1910) ("Time works changes, brings into existence new conditions and purposes. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.").

186. Needless to say, this Article does not presume to resolve every question that my proposal might raise. I have not addressed, for example, the possible use of provisional review by the lower federal courts or by state courts considering federal constitutional questions.

187. *See supra* notes 138-143 and accompanying text.

in determining the content of constitutional rights.[188]

Although my proposal for reshaping judicial review forms an essential part of this Article,[189] there is more to my effort. I have explained how the doctrine of judicial finality presents serious theoretical problems in the context of nonoriginalist review, and I have addressed those problems in discussing the functions and functional operation of this review. Perhaps most significant, I have highlighted the nationalizing function of nonoriginalist review, a function that can only increase in importance as we draw ever closer together as a society—as an *American* society.

What John Donne wrote of the European community in the 1620's might suggest a vision of the United States for the 1980's and beyond, a vision in which we increasingly regard each of our fellow citizens,[190] from whatever state or region, as part of the American polity and as persons therefore equally entitled to the fundamental rights that we value as a nation:

> No Man is an *Iland*, intire of it selfe; every man is a peece of the *Continent*, a part of the *maine*; if a *Clod* bee washed away by the *Sea, Europe* is the lesse, as well as if a *Promontorie* were, as well as if a *Mannor* of thy *friends* or of *Thine owne* were; Any Mans death diminishes me, because I am involved in *Mankinde*; And therefore never send to know for whom the *bell* tolls; It tolls for *thee*.[191]

188. The primary justification for provisional review, however, lies not in its facilitation of majoritarian rule, but rather in its utility in furthering the proper identification of nonoriginalist constitutional rights. A complete reconciliation of nonoriginalist review with the principle of majoritarian rule—if any such reconciliation is possible—depends on evidence that Congress has consented to the Supreme Court's nonoriginalist role by declining to restrict the Court's appellate jurisdiction. *See* Conkle, *supra* note 6, at 638-58.

189. Needless to say, a failure by the Supreme Court to adopt my proposed model would in no way affect its theoretical integrity.

190. For an essay suggesting that even a limitation of "fellow citizens" may be problematic, see Walzer, *The Distribution of Membership,* in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1 (1981).

191. J. DONNE, *Devotions,* XVII.