The Nature of Judicial Review*

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In *The Nature of the Judicial Process*,[1] Cardozo is concerned with the sources of common law: how do judges decide cases; what counts as justification for decisions that rest uneasily, if at all, on precedent and that are not required by a written text? Although evidently struck by the power common-law judges exercise in such situations, Cardozo was not moved to question the legitimacy of that power. Instead, he considered it sufficient to explain and classify the various methods courts use in reaching decisions. This predominantly descriptive approach assumes, among other things, that judges ought to make the common-law, that is, ought to fashion principles and policies into standards of decision. Cardozo's assumption remains the conventional understanding: while we may disagree strongly with particular decisions, we rarely question the authority of common-law courts, even in pivotal cases.

Judicial review is another matter. Almost every important case that displeases some sizeable group leads to questions about the legitimacy of the famous doctrine proclaimed in *Marbury v. Madison*.[2] To speak only of the recent past, it was some sixteen years after publication of *The Nature of the Judicial Process* that judicial review of New Deal legislation brought the executive and the Supreme Court into direct confrontation.[3] More recently, the segregation,[4] reapportionment,[5] and abortion cases[6] have provoked very serious attacks on the Court. In addition, the attempt to find a justification for judicial review is again engaging the attention of

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1. B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

2. 5 U.S. (1 Cranch) 137 (1803).

3. *See* R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY (1941); Lerner, *The Great Constitutional War*, 18 VA. Q. REV. 530 (1942); Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

4. Brown v. Board of Educ., 347 U.S. 483 (1954).

5. Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962).

6. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

several of our prominent constitutional scholars,[7] even as it did an earlier generation some twenty years ago.[8]

This difference in attitudes toward constitutional and common-law adjudication is fostered by a popular and influential view of our legal and political landscape. We tend to think of courts at common law as acting because the legislature has not and as making law the legislature can unmake. When statutes are involved, we see our courts either as effectuating legislative will or, through an occasional misreading of legislative intent, as producing an incorrect decision that can be remedied easily by a legislative reform. But in picturing judicial review, we imagine Justices appointed for life permanently thwarting the will of the people by striking down the work of their elected representatives.

This general picture, although partially accurate, seriously distorts reality. Statutory interpretation may be contrary to legislative intent and difficult for legislators to alter. Constitutional decisions, in contrast, may be short-lived and involve no legislative judgment.[9] Moreover, the majoritarian prerogatives allegedly infringed by judicial review may, for reasons unrelated to judicial power, be weaker than is commonly supposed. Our governmental system—quite apart from its judicial branch—is itself designed to temper and check the power of majorities. Furthermore, interest groups of one sort or another and, of course, the press, not only help to form majorities, but also act to slow and deflect the efforts of minority coalititions that have achieved majority status.

I will argue that when our practices are viewed in this light, the burden of justification commonly imposed on judicial review appears unduly heavy. The power to act in derogation of the immediate or apparent wishes of the majority is peculiar neither to constitutional adjudication nor, more generally, to the courts. But judicial review does stand out from other countermajoritarian practices by virtue of the apparent finality of constitutional decisions. It is thus the issue of finality, more than other questions posed by majoritarian theory, that proponents of judicial review must address. Finality raises at least two questions: One asks how final constitutional decisions really are. The second wonders how transitory are

7. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980); M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICY MAKING BY THE JUDICIARY (forthcoming).

8. *See, e.g.*, A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, THE PEOPLE AND THE COURT (1960); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *See also* Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968).

9. *See generally* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 77-78, 89-90 (1969) (nonlegislative actions, such as those of law enforcement officers, also give rise to constitutional decisions).

other nonmajoritarian decisions of consequence. Each of these issues, moreover, inevitably brings one to the questions regarding the sources of law that Cardozo addressed in *The Nature of the Judicial Process.*

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Majoritarianism, taken by itself, may be thought to require that each citizen be granted one equal vote, and that simple majorities control the course of government.[10] Although adopted in more or less this form by the reapportionment cases,[11] this simple theory of political fairness[12] is neither established by nor easily reconciled with the Constitution. That document forbids the direct popular election of the President; it does not forbid gerrymanders.[13] And by direct constitutional command, Senators chosen by electorates of varying size wield equal voting power.[14] Moreover, the Constitution protects the important advantage of wealth in the political process: the First Amendment forbids significant governmental restraints on individuals who have the means and the desire to finance the widespread expression of their political opinions.[15]

When we move from the deep structure of the Constitution to well-established legislative practice we find—and it is hardly a surprise—a further dilution of majority rule. Thus, although recently diminished, seniority prerogatives remain considerable,[16] and committee chairmen exercise substantial power.[17] Congressmen are dependent on their staffs, and con-

10. *See* J. RAWLS, A THEORY OF JUSTICE 221-28 (1971).

11. *See* Reynolds v. Sims, 377 U.S. 533 (1964).

12. Although simple in its requirements, this theory may be impossible to implement:

> [I]f we expect majority rule to produce what a majority really wants, then democracy cannot work flawlessly even in theory. Voting theorists . . . have known that the outcome of majority voting, even in a direct democracy with no opportunity to form coalitions, may be merely the artifact of the placement of issues on the public agenda.

Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TULANE L. REV. 849, 858 (citing Levine & Plott, *Agenda Influence and its Implications*, 63 VA. L. REV. 561 (1977)). *See also* B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 289-93 (1980) (effect of agenda manipulation on system of majority rule).

13. U.S. CONST. art. II, § 1. *See* Gaffney v. Cummings, 412 U.S. 735, 751-54 (1973).

14. U.S. CONST. amend. XVII.

15. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (limitations on "independent" expenditures held unconstitutional). The circuit court decision that *Buckley* reversed in part had upheld independent expenditure limitations on the theory that they implemented the "one-man, one-vote" principle established in the reapportionment cases. *See* Buckley v. Valeo, 519 F.2d 821, 841 (D.C. Cir. 1975); *see also* Common Cause v. Schmitt, 50 U.S.L.W. 4161, 4168 (U.S. Jan. 19, 1982) (per curiam) (judgment affirmed by a divided Court) (limitation on political expenditures of independent groups held unconstitutional).

16. "What the congressional seniority system does as a system is to convert turf into property . . . [a]nd the property automatically appreciates in value over time." D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 95-96 (1974); *see also* R. DAVIDSON & W. OLESZEK, CONGRESS AGAINST ITSELF 272 (1977); Polsby, Gallaher & Spencer, *Growth of the Seniority System in the U.S. House of Representatives*, in CONGRESSIONAL BEHAVIOR 172-202 (N. Polsby ed. 1971).

17. *See* J. CHOPER, *supra* note 7, at 19-21, 38-42; R. DAVIDSON & W. OLESZEK, *supra* note 16, at 49; B. HINCKLEY, THE SENIORITY SYSTEM IN CONGRESS 92-93 (1971).

gressional staffs advance their own agenda.[18] The press,[19] and lobbyists and lawyers representing powerful corporate and union clients, exert extraordinary influence on the legislature and, of course, on other branches of government—elected and appointed.[20]

The standard practices of government departments and agencies diverge still further from simple majoritarian precepts. Extensive job security and sheer numerical weight invest bureaucrats with considerable control over policy.[21] Indeed, the bureaucracy is often entrenched firmly enough to exercise its power in the teeth of popular mandates.[22] Nor is it easy for the people's representatives to revoke the broad delegations of power that make such entrenchment possible. The needs that initially prompted the establishment of an agency or bureau may still exist, or, indeed, have grown increasingly acute. In such circumstances, the legislature's dependence on the agency will force it to acquiesce in at least certain unpopular agency initiatives.[23] Moreover, even when the legislature is willing to abolish a particular agency or bureau, private groups that have relied on its policies or existence may fiercely oppose the revocation of delegated power.[24] It is the rare case in which neither a sizeable group of legislators

18. *See* M. MALBIN, UNELECTED REPRESENTATIVES: CONGRESSIONAL STAFF AND THE FUTURE OF REPRESENTATIVE GOVERNMENTS (1980).

19. *See, e.g.*, D. CATER, THE FOURTH BRANCH OF GOVERNMENT (1959) (discussing power of the press); Robinson, *Television and American Politics: 1956-1976*, 48 PUB. INT. 3, 11-14 (1977) (discussing influence of television news coverage on political opinions).

20. As one commentator notes:

> [I]t is generally agreed that by transmitting pertinent information to key lawmakers, by skillfully and selectively applying pressure at critical points in the system, and by expending massive sums of money—not infrequently in an abusive, occasionally criminal, manner—they [lobbyists] are able to exercise power well beyond the force of the numbers of people they represent.

J. CHOPER, *supra* note 7, at 23. *See also* R. DAHL, DEMOCRACY IN THE UNITED STATES 454 (3d ed. 1976); M. MAYER, THE LAWYERS 51-52 (1966); D. TRUMAN, THE GOVERNMENTAL PROCESS 352-94 (2d ed. 1971).

21. *See* W. NISKANEN, BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 138-54 (1971) (bureaucracy acts contrary to popular will). The point is well made by Hodding Carter with respect to the Department of State. *See* Carter, *The Unequal Bureaucratic Contest*, Wall St. J., Jan. 8, 1981, at 21, col. 3; *see also* A. DOWNS, INSIDE BUREAUCRACY 134-35, 152-53 (1967) (difficulty of controlling bureaucracy); Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1408-09 (1975) (ability of politicians to influence agency policy decreases as agency ages and presumption of independence and expertise grows).

22. *See* W. NISKANEN, *supra* note 21, at 138-54; Cutler & Johnson, *supra* note 21, at 1401 n.21 (Federal Reserve continues to implement monetary policies despite attacks); *cf.* Nathan, *The "Administrative Presidency,"* 44 PUB. INT. 40 (1976) (controlling bureaucracy is one of most difficult jobs facing President).

23. With respect to many regulatory endeavors, "it may be impossible in the nature of the subject matter to specify with particularity the course to be followed." Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975). In addition, Congress' own institutional shortcomings compel it to accept some agency discretion as an inevitable cost of effecting its regulatory goals. *Id.* at 1695-96.

24. Thus, for example, businesses typically support regulations that insulate them from competition in the marketplace. *See* R. NOLL, N. PECK, & J. MCGOWAN, ECONOMIC ASPECTS OF TELEVISION REGULATION 205-07 (1973); Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INT. 77, 98-99

nor a powerful private group has a large stake in the survival of a government bureau. Therefore, it is common for individuals who are neither elected nor recently appointed by elected officials to direct or influence significantly the course of government.

It is possible to view these countermajoritarian forces in the Constitution, legislatures, the bureaucracy, and private associations as flaws in our democratic system, and to characterize government as a failed attempt to achieve the simple majoritarian ideal.[25] But such a view seems mistaken. While countermajoritarian forces impede the immediate implementation of majority preferences and sometimes result in their reformulation, the delay and reformulation often is a prudent constraint on governmental action.

Such forced incrementalism provides several important benefits: First, impediments to the instant gratification of majorities allow proposals for legislative change to be considered carefully. This may be desirable even though the creation of a particular majority itself has been time-consuming. For it is surely the case that, in creating a majority for a proposal, proponents may fail to examine fully the proposal's demerits.[26] Second, reliance on extended debate allows the political system to gauge the intensity with which a position is advanced, rather than merely the number of people who advance it.[27] Third, while it is easy to belittle an earlier generation's exaggerated faith in administrative expertise, it is also easy to forget that the influence of the bureaucracy in departments and agencies does allow dedicated administrators with on-site experience to make constructive and often unpopular contributions to government policy.[28] Fourth, the deliberate allocation of power to groups not dominated by a present coalition of fifty-one percent insures both that no one "faction" will acquire too much power, and that affirmative governmental decisions

(1975). They also favor regulations that simply impose additional costs; having invested heavily to comply with governmental requirements, businesses often fear the comparative cost-advantage deregulation would afford future entrants into their markets. *See* N.Y. Times, Aug. 2, 1979, at A14, col. 1 (GM, after investing to meet fuel-efficiency standards, supports them).

25. *See infra* note 68. *But see* Shapiro, *Judicial Modesty, Political Reality, and Preferred Position*, 47 CORNELL L.Q. 175 (1962).

26. *See* Bickel, *supra* note 8, at 70 (by refusing to act through jurisdictional and other techniques, the Court seeks to "elicit the correct answers to certain prudential questions" from the political process); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1, 27 (1957) (Congress, in responding to popular will, may unknowingly sacrifice long-range values for immediate results; such values are protected through judicial review).

27. *See* Kendall & Carey, *The "Intensity" Problem and Democratic Theory*, 62 AM. POL. SCI. REV. 5 (1968). *See also* A. BICKEL, REFORM AND CONTINUITY 16, 17 (1971) (American political system recognizes that opinions, preferences and interests vary in intensity); R. MUSGRAVE & P. MUSGRAVE, PUBLIC FINANCE IN THEORY AND PRACTICE 113-15 (2d ed. 1976) (intensity of preference registered through log-rolling and coalition formation).

28. A. BURNS, REFLECTIONS OF AN ECONOMIC POLICY-MAKER 418-22 (1978) (discussing ability of Federal Reserve to advance unpopular policies).

will rest on a broader and more stable base than simple majorities can provide.[29] Finally, by promoting stability, countermajoritarian practices protect from abrupt defeat expectations invited by existing arrangements.[30]

The majoritarian theory adopted by the reapportionment decisions does not override these justifications of countermajoritarian practices. For the reapportionment decisions have had no effect on countervailing doctrines that either explicitly or implicitly established the constitutional importance of incremental change. The vagueness and delegation doctrines, for example, have been described as requiring legislatures to engage in careful deliberation before they substantially alter the legal landscape.[31] When so employed, these doctrines impose upon law-makers duties of care that are neither mandated by, nor in many circumstances consistent with, a simple majoritarian scheme.

Other doctrines (also unaffected by the reapportionment decisions) do not directly foster, but instead presuppose incremental change, and thus provide constitutional support for those countermajoritarian practices that make incremental change possible. In particular, the efficacy of doctrines that emphasize the importance of an individual's "reliance interest" depends substantially on the political stability that our countermajoritarian practices foster. Such doctrines have been developed, among other areas, under the due process, takings, and contract clauses. For example, whether an interest rises to the level of "property" for purposes of the due process clause depends to a considerable extent on whether the relevant authorities have led the possessor of that interest to rely on its security and inviolability.[32] Similarly, a takings or contract clause claim may be seriously weakened by a showing that the possessor of the interest at issue had always been aware of the existence of a superseding regulatory mechanism.[33] Indeed, one commentator has noted that the contracts clause, al-

29. *See* A. BICKEL, *supra* note 27, at 16-19; R. DAHL, *supra* note 20, at 53-59 (American politics not fully democratic; partitioning ecourages incremental changes by creating strongholds from which minorities can block policy changes); Black, *National Lawmaking by Initiative? Let's Think Twice*, 8 HUM. RTS. 28, 30-31 (1979) (legislative process contains structural and procedural safeguards that protect minority interests and promote compromise). On incremental change generally, see D. BRAYBROOKE & C. LINDBLOM, A STRATEGY OF DECISION (1963).

30. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 3 (1982).

31. *See id.* at 18.

32. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593 (1972) (whether state provided de facto support for complainant's reliance is relevant to status of complainant's interest under due process clause); Board of Regents v. Roth, 408 U.S. 564 (1972) (property interest not created by unilateral or merely subjective expectation).

33. With respect to the contract clause, compare Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 249-50 (1978) (law impairing private pension agreement void because, among other things, it imposed an unanticipated retroactive obligation in field that legislature had not previously regulated) with Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38 (1940) (fact that complainant had "purchased into an enterprise already regulated in the particular to which he now objects" relevant to constitutionality of impairment).

With respect to the takings clause, compare Kaiser Aetna v. United States, 444 U.S. 164 (1979)

though originally of broader scope, has been narrowed to bar only the disruption of reasonable expectations.[34]

The instability fostered by a government that instantly gratified majorities would slow or halt the growth of reasonable expectations.[35] By thus destroying the foundations of reliance, such an overridingly majoritarian scheme would eventually deprive the property and contract clauses of what they are currently understood to protect.

Indirect support for the countermajoritarian value of continuity is also provided by the broad constitutional prohibition of ex post facto laws.[36] That proscription is intended to allow reliance upon the particular rights and duties established by the legislature.[37] Such security and repose as the proscription seeks to protect, however, could never develop in the absence of mechanisms that often impede short-run, direct accountability.

These features of our social and legal organization reinforce the proposition that the bureaucracy, the congressional staff, the special pleaders, and others cannot be condemned because of their countermajoritarian character. To the contrary, it is precisely by exercising their limited freedom from the majority that these political forces advance values important to our complex constitutional design.

3

Although not worrisome simply because they are countermajoritarian, at least some of the political forces discussed above are worrisome indeed. The perspective of minority power holders is often constrained by the needs of their constituents. Yet those constituents are not themselves disinterested: where they seek to check the efforts of the majority, they do so out of self interest. Accordingly, these countermajoritarian forces cannot be relied upon merely to restrain majority willfulness. Instead, if given the opportunity, such forces may hold hostage to minority demands even those

(government's attempt to compel free public use of corporation's assets went so far beyond ordinary regulation as to interfere unconstitutionally with corporation's reasonable investment-backed expectations) with Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124, 135-36 (1978) (relevant to landmark preservation law's validity that it did not interfere with "distinct investment-backed expectations") and City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974) (incremental increase in preexisting gross-receipts tax not taking even where tax, in combination with government-subsidized competition, renders business unprofitable).

34. *See* J. ELY, *supra* note 7, at 92.

35. *See* G. CALABRESI, *supra* note 30, at 3 ("If legal-political institutions are too responsive to change, however, temporary and unstable majorities are apt quickly to impose their will. New laws are passed only to be followed by quick reversal at the next election, leading to uncertainty and to the defeat of legitimate expectations.")

36. U.S. CONST. art. I, § 10.

37. *See* Weaver v. Graham, 101 S. Ct. 960, 964 (1981) (Framers sought through prohibition "to assure that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed").

many majoritarian proposals that are carefully fashioned, incremental solutions to important problems.[38]

Where countermajoritarian institutions do not overreach, but merely moderate majority claims, personal interest or a narrowness of vision still determines and confines their ability to contribute to the process of government. Because they often deflect the momentary passions of the majority, countermajoritarian political forces may well provide protection for longer range concerns in politics. Their interest in, or perspective on, particular results, however, necessarily renders such protection episodic and often erratic. Accordingly, to ensure the considered and careful protection of those principles that constitute our political inheritance, we require a distinctive political force.

The special attributes of courts—the fact that judges are disinterested generalists[39]—enables them to serve this distinctive function better than other political institutions. Judges—and especially Article III judges—are deliberately removed from the pressures to which many other governmental actors are deliberately exposed.[40] Their relative insulation from the direct claims of special interest constituencies protects judges from the partisan views of other political actors. At the same time, the generality of their jurisdiction enables judges to discern, better than others with narrow jurisdiction and, therefore, limited vision, the enduring principles and longer range concerns that tend to be forgotten where either the interests of factions collide[41] or the perspectives of bureaucrats prevail.

Indeed, it is the special role of courts, when confronted with a bureaucratic distortion or, more importantly, a sharp clash of interests, to examine the views the community expressed in calmer moments, and to infer from those expressions that recur principles of general application.[42] Thus, while other countermajoritarian institutions out of parochial interests slow the rate of change, the courts alone deliberately search the past for elements worth preserving. By applying those elements to the often heated controversies before them—thereby reminding the polity of the val-

38. This problem is discussed in Calabresi's splendid book, *see supra* note 30, at 6, 48-49, 124-29. It is worth noting that Calabresi's solution is carefully tailored to preserve the balance between continuity and change that has distinguished American common law. *Id.* at 118-19.

39. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979). By disinterested, of course, I do not mean uninterested. I do mean one who is not influenced by selfish motives or personal advantage. And by generalist, I do not necessarily mean a Renaissance Person. I certainly do not mean an amateur. I do mean one who is engaged with and knowledgeable about the law, conceived broadly.

40. *See id.* at 1-12; Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 248-49 (1973).

41. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 86-87 (1970); Wellington, *supra* note 40, at 246-48.

42. This point is elaborated in Wellington, *supra* note 40, at 246-48.

ues to which it has long adhered[43]—the courts may be seen as the key political institution charged with taking account of our public traditions.

The costs of uniting present and past should be acknowledged: our predecessors too were imperfect. Nevertheless, a governmental structure that fails to unite a nation's present with its past necessarily fails to preserve values to which its citizens may attach considerable weight. It fails to make a contemporary effort to understand what we have been or have wished as a people to become, and thus it fails to give effect to what might be called the moral ideals of the community. Those ideals cannot be understood by the bureaucracy, the special pleaders, and the congressional staffers. Theirs is a tunnel vision, and the tunnel vision of one is not offset by that of the others. Nor would these ideals be given adequate voice in a simple majoritarian government where the passionate and self-interested concerns of the moment were too easily accorded sovereignty.[44]

Many may have trouble with the view that courts should seek to discover and use the moral ideals of the community as a source of legal principles.[45] But it is less controversial, and for present purposes sufficient, to note that courts do in fact seek to preserve principles that are threatened by majority preferences, and that they do so even in cases where the abandonment of those principles would not raise constitutional questions.

The most important method courts use in this task is statutory interpretation. It is standard and appropriate for courts to employ general legal principles to construe the open texture of statutes.[46] This is not necessarily countermajoritarian, although sometimes statutory purpose and general legal principles pull in different directions.[47] Sometimes interpretation is clearly countermajoritarian as the following three cases show. In none am I concerned with whether the particular decision is correct. The cases are used to demonstrate an approach, a judicial function, that contributes to, and is inherent in, the judicial process.[48]

Roto-Lith v. Bartlett,[49] a contract case, provides an example of this judicial function. The common law, concerned with the principle of voluntarism, had long required assent as a necessary condition of binding con-

43. *Id.* at 245.

44. *See infra* note 133.

45. For a brief defense of this concept, see *infra* note 133; for its elaboration, see Wellington, *supra* note 40, at 243-54, 272-311.

46. *See* Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).

47. *See* NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).

48. This judicial approach has been both praised, *see* H. Hart & A. Sacks, The Legal Process 1240 (tent. ed. 1958) (unpublished manuscript on file with Yale Law Library), and criticized, *see* Pound, "*Common-Law and Legislation*," 21 HARV. L. REV. 383 (1908). Although occasionally abused through judicial overreaching, *cf.* G. CALABRESI, *supra* note 30, at 24 (criticism of "strict construction of statutes in derogation of the common law" provoked by judicial abuse), the approach has over the generality of cases provided a unique and important check on legislative action.

49. 297 F.2d 497 (1st Cir. 1962).

tracts—absent a precise acceptance by the offeree of each aspect of the offer, a contract would not be formed.[50] The Uniform Commercial Code broke with this position. In particular, Section 2-207 of the Code provided that a binding agreement could be found even if a response to the offer stated additional or different terms.[51] The Code's innovation had the effect of requiring offerees wishing to alter the terms of an offer to make such alterations express conditions of acceptance.[52] If an offeree did not do this, and if the transaction was between "merchants," the Code undertook to sever those disputed terms that "materially altered" the contract, and to find an acceptance of the remainder of the offer.

The *Roto-Lith* court was unwilling to countenance such a divergence from the common law:

> The statute is not too happily drafted. Perhaps it would be wiser in all cases for an offeree to say in so many words, "I will not accept your offer until you assent to the following: . . . ." But businessmen cannot be expected to act by rubric. It would be unrealistic to suppose that when an offeree replies setting out conditions that would be burdensome only to the offeror he intended to make an unconditional acceptance of the original offer, leaving it simply to the offeror's good nature whether he would assume the additional restrictions. To give the statute a practical construction we must hold that a response which states a condition materially altering the obligation solely to the disadvantage of the offeror is an "acceptance . . . expressly . . . conditional on assent to the additional . . . terms."[53]

By misconstruing the Code in this manner,[54] the court in *Roto-Lith* deflected the majoritarian attempt to compromise (in this type of situation) the underlying and central common-law principle that emphasizes the need for voluntary acceptance of contractual burdens.[55]

50. *See* Iselin v. United States, 271 U.S. 136, 139 (1926); Prescott v. Jones, 69 N.H. 305, 305-6, 41 A. 352, 352-53 (1898); More v. New York Bowery Fire Ins. Co., 130 N.Y. 537, 547, 29 N.E. 757, 759 (1892). For an interesting historical perspective on voluntarism and competing concepts in contracts, see Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1981).

51. *See* U.C.C. § 2-207 (1972).

52. *Id.*

53. 297 F.2d 497, 500 (1st. Cir. 1962).

54. *See, e.g.*, Comment, *Commercial Law—Offer and Acceptance—Under Uniform Commercial Code Purchaser of Goods Is Bound by Disclaimer of Warranties Contained in Seller's Expression of Acceptance*, 76 HARV. L. REV. 1481, 1482-83 (1963) (criticizing *Roto-Lith*); Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540, 553-54 (1963) (same).

55. The Supreme Court recently applied a very similar principle to protect states from the inadvertent assumption of burdens stemming from "contracts" or agreements executed by the federal government pursuant to its spending power. *See* Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981). The Court narrowly construed a federal "grant-in-aid" statute to limit the obligation it imposed on states as a condition of the receipt of federal funds. The Court did not prospectively forbid the imposition of substantial obligations on states, but merely required, in accordance with the com-

Textile Workers Union v. Darlington Manufacturing Co.[56] is a different sort of case, but also one in which the judiciary thwarted majoritarian goals in the service of what it took to be an important general principle. In that case the Supreme Court held, among other things, "that so far as the Labor Relations Act is concerned, an employer has the absolute right to terminate his entire business for any reason he pleases . . . ."[57] The proposition that had been advanced by the Textile Workers was "that an employer may not go completely out of business without running afoul of the . . . Act if such action is prompted by a desire to avoid unionization."[58] To this the Court replied that the union's position "would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent . . . ."[59]

Of course the Act clearly does make it an unfair labor practice for an employer to discharge its employees because they join a union.[60] And, of course, the union's position was that for an employer to go out of business because its employees joined a union is tantamount to a discharge. Surely this is correct. Nor was the question of remedy troublesome: while reinstatement with back pay is standard, in this case the order below was that the employer pay its employees "until they obtain substantially equivalent work . . . ."[61]

Accordingly, it seems that the purpose of the statute supported the union's claim and, one would suppose, the statute's purpose reflected majoritarian will in the same way that any non-anachronistic enactment does. But there is an issue of economic freedom, at least at a symbolic level: one—even if the one is a major corporation that generally is referred to by the pronoun "it"—should be free to be or not to be. It is this principle that the Court employed to deflect the indicated majoritarian result. Observe, moreover, that this principle has no constitutional standing: the

mon-law principle advanced in *Roto-Lith*, that those obligations be stated clearly and specifically by Congress. *Id.* at 22-27. The Court also instructed Congress to make unmistakably plain its intent to rely on Section 5 of the Fourteenth Amendment. *Id.* at 15-16. This instruction makes more difficult the enactment of legislation that coerces state behavior; it also insures that states receive notice of the federal requirements with which they must comply.

Neither this discussion of *Pennhurst* nor my use of any other case is intended to imply agreement with substantive results. While endorsing the judicial technique that moderates majorities without permanently foreclosing legislative choices, I would readily concede that this technique, like every other, can be abused.

56. 380 U.S. 263 (1965).

57. *Id.* at 268.

58. *Id.* at 269-70.

59. *Id.* at 270.

60. "It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 183 (1941). *See* J. GETMAN, LABOR RELATIONS 113-14 (1978).

61. 380 U.S. 263, 267 (1965).

state of economic due process today makes it certain that "the clearest manifestation of [contrary] legislative intent" would succeed.

Vincent v. Pabst[62] provides a more complicated example of countermajoritarian judicial revision and reveals a different aspect of the judicial role. That case involved a Wisconsin statute that denied recovery to a tort plaintiff whose own negligence was equal to or greater than the negligence of the defendant.[63] Its retention of contributory negligence put the statute at odds with the common law, which, by the time *Vincent* was decided, was moving rapidly toward full comparative negligence.[64] Thus, the circumstances underlying *Vincent* were both different from and similar to those from which *Roto-Lith* and *Darlington* arose: in each case legislation, for better or worse, compromised principles of importance in the relevant jurisprudence. In *Vincent*, however, the common law had overtaken the legislation. The principle involved was relatively new in terms of its legal status. Unlike the courts in *Roto-Lith* and *Darlington*, the *Vincent* court was not acting as a guardian of the past.

The *Vincent* court, moreover, did not directly vitiate and rewrite the Wisconsin statute to conform to the principle of the common law. Perhaps because it was aware that the legislature had considered and rejected comparative negligence, members of the court chose the less intrusive, though still countermajoritarian, tactic of threatening to rewrite if the legislature did not act itself.[65] In order to make that threat credible, they had first to establish that the court possessed the power to apply the common law.[66] They accomplished this through a deliberate and plain misconstruction. In particular, several Justices held that the statute covered only those cases in which the plaintiff's negligence was less than the defendant's; as to all other cases, these Justices found the statute to be silent. Tailored to permit a consistent application of the common law, this misconstruction constituted not direct, but "prospective" countermajoritarian revision.

The insight to be taken from this brief excursion into non-constitutional adjudication is that even when no constitutional question is raised, the courts, like other imperfectly representative institutions, may sometimes blunt the efforts of majorities. Unlike those other institutions, however, the courts check majorities in a selective and deliberate fashion. In particular, they seek to preserve principles that, from their generalist perspective, are, for one reason or another, significant.[67]

62. 47 Wis. 2d 120, 177 N.W.2d 513 (1970). My knowledge of the case, and my analysis of it, stem from G. CALABRESI, *supra* note 30, at 36-43, 210 nn.16-29.
63. WIS. STAT. ANN. § 895.045 (West 1966).
64. *See* G. CALABRESI, *supra* note 30, at 210 nn.18-19.
65. *Id.* at 36.
66. *Id.* at 36-37.
67. *See* Bickel & Wellington, *supra* note 26, at 27.

4

The foregoing discussion provides reasons for challenging the standard critique of judicial review. That critique supposes that from our practice in the normal course, adherence to the principle of simple majority control can be inferred. According to the critique, divergences from this principle are not deliberate; instead, no matter how frequently encountered, they are dismissed as inadvertent failures to achieve the majoritarian ideal.[68] As I have suggested, however, few of our practices are overridingly majoritarian. To the contrary, wherever our system creates a danger of majority willfulness, some tempering device is interposed. Accordingly, the critics of judicial review should not ask us to assume that any failure to support the preferences of majorities requires special or extraordinary justification. Indeed, it may be that the critics should bear the burden of persuasion. After all, it is they who question a one hundred and fifty-year old precedent that fits comfortably within our complex governmental structure and that makes a distinctive contribution to that structure.

Of course, the critics may respond that other countermajoritarian institutions do not exercise power after the enactment of legislation. Thus, one commentator has recently suggested that "[t]he existing antimajoritarian influences in . . . legislatures, capable though they may be in *blocking* legislation, are not well situated to get legislation passed in the face of majority opposition."[69] This commentator does recognize that "[t]here may . . . exist situations in which a majority cannot pass a law repealing old legislation because of minority resistance."[70] And I am sure he knows that countermajoritarian institutions do, apart from judicial review, exercise power after the fact. Statutory interpretation by agencies, departments, and courts, for example, often departs from legislative intent. But more importantly, it is not so much the timing, as it is the nature, of a declaration of unconstitutionality that is significant. Assume that the Court, in order to make the short-run effects of judicial review more like "[t]he existing antimajoritarian influences in legislatures," issued binding constitutional opinions only before the legislature acted. Would it matter very

68. *See* A. BICKEL, *supra* note 8, at 18 ("[I]mpurities and imperfections, if such they be, in one part of the system are no argument for total departure from the desired norm in another part."); J. CHOPER, *supra* note 7, at 57-59 (that representative institutions are imperfectly majoritarian does not affect legitimacy of judicial review); R. DWORKIN, TAKING RIGHTS SERIOUSLY 141 (1977) (that legislatures are imperfectly majoritarian "does not so much undermine the argument from democracy as call for more democracy"). *See also* J. ELY, *supra* note 7, at 67. *But see* Hazard, *The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 10-11 (1978) (arguing that democratic principles tolerate allocation of some power to unrepresentative institutions); Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 197-200 (1952) (noting similarity between judicial review and other well-established countermajoritarian practices).

69. *See* J. ELY, *supra* note 7, at 67 (citing Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. PA. L. REV. 810, 830-32 (1974)).

70. *Id.*

much, for these purposes?[71] I think not because I believe that the real anxiety over judicial review is not its countermajoritarian nature as such; it is rather the seeming finality of a constitutional pronouncement by the Supreme Court.

5

The task of defending judicial review is a different one if the anxiety over the practice derives from problems of finality rather than from the inescapable fact that judicial review is countermajoritarian. In order to distinguish between these tasks, it may be helpful, before addressing the issue of finality, to examine briefly a justification of judicial review that is concerned primarily with its countermajoritarian nature.

Today the most prominent such justification draws its inspiration from the second and third paragraphs of footnote four of a 1938 case, *United States v. Carolene Products Co.*[72] But for the footnote, the case would not be remembered. It stands with others of its time in sustaining economic legislation that less than a decade earlier would have been invalidated under the due process clause. Speaking for the Court, Justice Stone made it plain that economic legislation was to enjoy a powerful presumption of constitutionality, indeed, that it would survive challenge under that once formidable clause if the legislation had a "rational basis."

The footnote, after suggesting that this presumption might have less force when legislation is questioned under constitutional provisions that are more linguistically precise than due process, continues as follows:

> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[73]

Footnote four can be seen as "a participation-oriented, representation-

71. For reasons largely unrelated to the countermajoritarian difficulty, Article III has been construed to forbid premature judicial judgments. *See* Poe v. Ullman, 367 U.S. 497 (1961). For a different view of Article III, see A. BICKEL, *supra* note 8, at 115-16.

72. 304 U.S. 144, 152 n.4 (1938).

73. *Id.* at 152, 152 n.4, 153.

reinforcing approach to judicial review,"[74] and, as such, it is wonderfully attractive. It aims our attention to failures of process in the legislative or executive branches rather than to failures of substance. And process, after all, is a comfortable and familiar domain of lawyers and judges.

Professor John Hart Ely, in a recent book, puts footnote four in terms of the malfunctioning of the more majoritarian branches:

> Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they still stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.[75]

While malfunction in the process may be a good reason for the exercise of judicial review, the notion that its absence requires the denial of review is, at least on first impression, both striking and contrary to our intuitions. Are there not substantive malfunctions that require serious judicial review? Is it not the case, for example, that government sometimes intrudes on individual autonomy and privacy without sufficient justification? Is not the Court's capacity here as great, and its role as important, as when the perceived malfunction is one of process?

Professor Ely's "answer" is emphatically negative:

> Our government cannot fairly be said to be 'malfunctioning' simply because it sometimes generates outcomes with which we disagree, however strongly . . . . *In a representative democracy value determinations are to be made by our elected representatives*, and if in fact most of us disapprove we can vote them out of office.[76]

Ely's attempt to withdraw value determinations from the courts results from his commitment to the simple majoritarian premises that I have suggested do not accurately reflect the nature of our governmental structure. In a representative democracy, value determinations are made, and are meant to be made, by many actors who cannot possibly be described as "our elected representatives."

Moreover, this unrealistic attachment to simple majoritarian premises—either as an is or an ought—may indeed impose an insuperable bur-

74. J. ELY, *supra* note 7, at 87.
75. *Id.* at 103 (emphasis in original) (footnote omitted).
76. *Id.* (emphasis added).

den on proponents of judicial review. Surely Ely does not overcome the problem that he thinks they present. For there are at least two inevitable and fatal difficulties with his attempt to bar consideration of values in constitutional adjudication. First, the judicial diagnosis of a process malfunction may itself entail a value determination. For example, given the method for selecting United States senators and the gerrymander, it is far from clear how, in many situations, a court can know whether a legislative apportionment is improper, unless, of course, it develops a theory of political fairness. But can anyone develop such a theory without making at least one value determination?[77] Second, the judicial cure for a process malfunction also may require judges to make value determinations. Consider free speech. "Courts must," as Ely tells us, "police inhibitions on expression and other political activity because we cannot trust elected officials to do so: ins have a way of wanting to make sure the outs stay out."[78] Agreed. But a court must place a value on reputation if it is to fashion a First Amendment rule protecting expression considered defamatory under state law. *New York Times v. Sullivan*[79] may be the correct cure for a process malfunction. But after reading the case, it is apparent that Justice Brennan found it necessary to make more than one value determination.

Judicial value determinations are inescapable. As I have argued, they are also unexceptional. What is exceptional in judicial review is that value determinations in constitutional cases have the appearance of finality. And this is perceived even though the Court has neither purse nor sword;[80] even though the Congress has power over the Court's appellate jurisdic-

77. For the value determinations that Ely makes, see *id.* at 123.

78. *Id.* at 106.

79. 376 U.S. 254 (1964).

80. As Alexander Hamilton put it:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.

THE FEDERALIST No. 78, at 465 (A. Hamilton) (C. Rossiter ed. 1961).

tion;[81] indeed, even though there is, within the Constitution itself, the possibility of amendment.[82]

If it can be shown, however, that often there is less finality in a constitutional decision than meets the eye, and that (unlike bureaucrats) the value determinations of judges in constitutional cases are constrained by norms applicable generally in adjudication, then perhaps we can accept more readily the legitimacy of judicial review.

6

The finality of judicial review, even as generally perceived, may seem less troublesome if compared with the accepted judicial function of statutory interpretation. In the *Rotolith*, *Darlington*, and *Vincent* cases, we saw how courts sometimes depart sharply from legislative intent; sometimes they do more. In some situations statutory interpretation forecloses legislative change. Thus, it may have more finality than we imagine (more indeed than many constitutional interpretations), and therefore, it can be more closely related to the standard picture of judicial review than is often supposed.[83]

Consider two examples: administrative agencies—particularly when they are young—sometimes interpret statutes with a zeal that is a variety of the tunnel vision I mentioned earlier. Instead of harmonizing the law it administers with the general law, an agency may ignore the surrounding jurisprudence, and its constitutional configurations. On review, the courts may then reinterpret the statute to avoid confronting the constitutional questions presented by the agency's single-minded devotion to its mission.[84] This describes the National Labor Relations Board in its spring-

81. The scope of the power is not clear. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), is the leading case. It should be read with *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869). *See* C. BLACK, DECISION ACCORDING TO LAW (1981); Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973). *See also* Sanger, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1982) (discussing limits of congressional authority to contract jurisdiction of federal courts). *Compare* Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977) (to insure against nullification of constitutional rights, Supreme Court must scrutinize state court decisions of law and fact) *with* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (suggesting that state courts may be ultimate guarantors of constitutional rights).

82. Only four Supreme Court decisons have been set aside by constitutional amendment: Oregon v. Mitchell, 400 U.S. 112 (1970); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

Justice Black, criticizing the Court's reinterpretation of a statute, has said: "[W]here the only alternative to action by this Court is the laborious process of constitutional amendment and where the ultimate responsibility rests with this Court, I believe reconsideration [of a constitutional decision] is always proper." Boys Mkts. v. Retail Clerks Union, 398 U.S. 235, 259 (1970) (Black, J., dissenting).

83. As will become clearer later, my claim is also that the reasons for this are related to the reasons for finality—when there is finality—in judicial review.

84. For an example of judicial disagreement over the propriety of this type of agency behavior in

time. It had a propensity to read the Wagner Act as if there were no First Amendment to the United States Constitution.[85] When unions organized, employers were at risk if they spoke, as they often did, in favor of the open shop.[86]

The Supreme Court, through statutory interpretation, denied the Board this power. To read the statute as the Board had would raise serious constitutional issues although it might be that the reading was constitutional. The issue could be avoided by interpretation that was sensitive to the value our law attaches to free expression.[87]

Because the Court did not render a constitutional decision in these cases, Congress retained the formal power to amend the statute to make it conform to the agency's interpretation. But in fact this would not have been easy. It is hard to rewrite labor statutes, and often it is difficult for Congress to ignore values that may be of constitutional dimension and that are called to its attention by the Supreme Court.[88]

In this statutory situation there is more finality than meets the eye, but little doubt about the legitimacy of the Court's role. Indeed, even if the Court did not have the power to declare legislation unconstitutional, it would have the authority to review agency action and the obligation to accommodate, through statutory interpretation, particular legislation to the principles that underpin our law.

The second example is again from labor law, but does not involve an administrative agency. Under the Railway Labor Act,[89] the union selected by a majority of employees in a bargaining unit is the exclusive representative of all employees in the unit. The statute is absolutely silent, however, on the question of the union's obligations to the employees it represents. In 1944 the practice of the brotherhoods, as some of the railway unions are called, was to discriminate and to do so with vigor.[90] Some employees who suffered sued. Their case made its way to the Supreme Court, which held that the "fair interpretation of the statutory language is

a non-constitutional setting, compare the majority and dissenting opinions in D.A. Schulte, Inc. v. Gangi, 328 U.S. 108 (1946).

85. *See* H.R. REP. NO. 245, 80th Cong., 1st Sess. 33 (1947) ("Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely.")

86. *See* NLRB v. Golub Corp., 388 F.2d 921, 926 (2d Cir. 1967) ("Under the Wagner Act . . . the Board condemned almost any antiunion expression by an employer.")

87. *See* NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941) (construing National Labor Relations Act narrowly to avoid clash between requirements of Act and employer's First Amendment rights); *cf.* Thomas v. Collins, 323 U.S. 516, 537 (1945) (application of state labor statute that imposed prior restraint on organizer held unconstitutional).

88. Some of the subsequent history of employer speech and the congressional response to Board and Court protection is traced in NLRB v. Golub Corp., 388 F.2d 921 (2d Cir. 1967).

89. 45 U.S.C. §§ 151-88 (1976).

90. *See* H. WELLINGTON, LABOR AND THE LEGAL PROCESS 145-55 (1968).

that the organization chosen to represent . . . is to represent all . . . and it is to act for and not against those whom it represents."[91] Chief Justice Stone, in his opinion for a unanimous Court, reasoned as follows:

> It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.[92]

The common-law doctrine that the Chief Justice grafted onto the statute—namely, that an agent must represent his principal fairly—is not a doctrine that a legislature could, even under tremendous political pressure from powerful groups, easily reject by amending the statute over which it theoretically has authority.[93] There is more finality in the interpretation of statutes, when that interpretation reflects the principles of our jurisprudence, than we sometimes imagine.[94]

7

In addressing the issue of finality in judicial review itself, it is essential to distinguish among various types of constitutional decisions. Some constitutional decisions do not even appear to be final. Others deal primarily with means rather than ends, and thus leave more than a little legislative discretion intact. Finally, certain types of decisions, although facially final, are properly subject to thorough revision, the principle of *stare decisis* notwithstanding.

The class of plainly non-final decisions might best be understood in terms of the Court saying to another governmental entity: "You may be able to achieve the substantive result you desire but you must proceed toward your objective in a different fashion." There is a family of such

91. Steele v. Louisville & N. R.R., 323 U.S. 192, 202 (1944).

92. *Id.*

93. Nor can this finality be explained simply on the theory that *Steele* was, at bottom, a constitutional decision. Justice Murphy, concurring, did argue that *Steele should* have been decided on constitutional grounds. 323 U.S. at 192, 208-09. At the time, however, this suggestion was innovative. The state action doctrine in 1944 was a long way from what it is today. For its application to unions, see Machinists v. Street, 367 U.S. 740 (1961), decided seventeen years after *Steele*. Moreover, *Steele* preceded Brown v. Board of Educ., 347 U.S. 483 (1954), by ten years; in 1944, the common-law notion of fair representation may have operated more powerfully on behalf of minorities than the equal protection clause.

94. *See supra* p. 502.

doctrines, procedural or structural in nature, such as "delegation,"[95] "void for vagueness,"[96] and "overbreadth."[97]

These doctrines have been much analyzed, and some have been described as techniques for introducing flexibility into constitutional adjudication.[98] The focus here is not on their flexibility or on the notion, as such, that they enable the Court to initiate a dialogue with another branch of government.[99] Nor am I now concerned with the related idea, that the more majoritarian branches must assume responsibility by speaking clearly and precisely if they want to achieve a goal that either lies in the "foothills of the Constitution," or that stigmatizes through the use of the criminal sanction.[100] Of course, these ideas are closely intertwined with my conception of the importance of countermajoritarian forces—especially the judiciary—to American democracy; but my interest at this point is in the degree of finality that attends a judicial decision.

In this respect the infrequently employed (at the federal level) delegation doctrine should be seen as requiring that the legislature spell out in more detail the standards a regulatory agency should apply in effectuating the substantive goal of the statute; the void for vagueness doctrine as requiring more specificity in articulating the goal to be achieved by the legislation under review; and the overbreadth doctrine as requiring that the substantive goal be stated as narrowly as possible. Far from foreclosing legislative choices, therefore, these doctrines shape the process by which legislative goals may be achieved.

8

Justice Stevens, dissenting in *Fullilove v. Klutznick*,[101] applied another variety of structural or procedural, and therefore non-final, review. The case involved the constitutionality of the minority business enterprise, or "set aside," requirement of the Public Works Employment Act of 1977. That provision requires, absent an administrative waiver, that at least ten percent of federal funds allocated to local public works projects be used to

95. *See, e.g.*, Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Kent v. Dulles, 357 U.S. 116 (1958); *see also* Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 LAW & CONTEMP. PROBS. 46 (1976).

96. *See, e.g.*, Cramp v. Board of Pub. Instruction, 368 U.S. 278 (1961); Thornhill v. Alabama, 310 U.S. 88 (1940).

97. *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Zwickler v. Koota, 389 U.S. 241 (1967).

98. *See* A. BICKEL, *supra* note 8, at 111-98.

99. *See generally* Bickel & Wellington, *supra* note 26 (discussing circumstances in which courts should "remand" statutes to Congress for further consideration).

100. *See* Wellington & Albert, *Statutory Interpretation and the Political Process: A Comment on* Sinclair v. Atkinson, 72 YALE L.J. 1547, 1560 n.42 (1963).

101. 448 U.S. 448, 548-49 (1980).

procure services or supplies from businesses owned by United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[102]

In a six to three split, the Court upheld the statute from a predictable equal protection challenge. Justice Stevens' dissent rested on due process grounds, and procedural due process at that:

> The very fact that Congress for the first time in the Nation's history has created a broad legislative classifiction 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 legislative hearing on the bill that was enacted.[103]

The Justice went on to describe this as a "malfunction of the legislative process" because of the "perfunctory consideration of an unprecedented policy decision of profound constitutional importance to the Nation." He said:

> Whenever Congress creates a classification that would be subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment if it had been fashioned by a state legislature, it seems to me that judicial review should include a consideration of the procedural character of the decisionmaking process. A holding that the classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not "narrowly tailored to the achievement of that goal."[104]

Justice Stevens' approach invites attention to separation of powers questions, as he notes.[105] They are questions that are also present in one of the statutory interpretation examples (the Railway Labor Act case) discussed earlier, and are in any event triggered by the doctrines of vagueness, delegation, and overbreadth. For surely whenever a court tells a legislature that it must speak clearly if it is to accomplish the goal it seems to have in mind—and that happens not infrequently[106]—the court is in-

102. 42 U.S.C. § 6705(f)(2) (1976 & Supp. II 1978).
103. 448 U.S. 448, 548-49 (1980).
104. *Id.* at 550-51 (footnote omitted).
105. *Id.* at 552.
106. *See* Wellington & Albert, *supra* note 100, at 1559-66.

structing the legislature on its internal procedures. Thus, Justice Stevens' approach—his insistence on structuring the law-making process—may be no more than an extension of an established judicial practice.

9

The Justice's approach invites us to examine other procedural due process or related constitutional interventions by the Court that may have less finality than we generally associate with judicial review. Consider the attempted judicial regulation of police behavior through such continuingly controversial decisions as those that established the *Miranda* requirements[107] and imposed the exclusionary rule.[108] I say "attempted" because part of the controversy turns on whether the requirements and the rule do make any difference in police behavior. Of course, in determining whether the Court's decisions are justified it may not matter. The point is that neither *Miranda* nor the exclusionary rule questions any substantive goal of any governmental entity. Both structure the means of achieving an end; both, perhaps, make the end's achievement more difficult. So do other things we tolerate, indeed, embrace. For example, police unions may interfere with efficient police work and the efficient administration of criminal justice as much or perhaps more than do these constitutional decisions. Moreover, there is as much certainty of the continuing existence of police unions as there is of the survival of *Miranda* and the exclusionary rule, and the voter may have as little direct control over one as he does over the other.

10

This discussion of structural or procedural judicial review highlights the important role of the Supreme Court as umpire-at-the-margin of the appropriate processes of other governmental entities. It reveals that judicial review, when so employed, does not preclude substantive legislative goals and accordingly that, so far as substantive finality is concerned, such constitutional adjudication closely resembles common-law and statutory interpretation: all three may make it harder for legislatures to reach particular goals; usually none prevents the attainment of those goals.

The examples employed of structural or procedural judicial review were, of course, meant to be suggestive; plainly, they are not exhaustive. I do, however, want to continue the discussion in one additional context, that of equal protection. The place to begin is with an observation made by Justice Jackson in *Railway Express Agency v. New York*.[109] The case

107. Miranda v. Arizona, 384 U.S. 436 (1966).
108. Linkletter v. Walker, 381 U.S. 618 (1965); Mapp v. Ohio, 367 U.S. 643 (1961).
109. 336 U.S. 106 (1949).

involved a New York City traffic regulation that barred advertising on delivery vehicles, unless the vehicles were "engaged in the usual business of regular work of the owner and not used merely or mainly for advertising." Railway Express had violated the regulation and was fined. It claimed that its due process and, more emphatically, its equal protection rights had been infringed. The Court was not sympathetic. But in his concurring opinion Justice Jackson said:

> The burden should rest heavily upon one who would persuade us to use the due process clause to strike down a substantive law or ordinance . . . . Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.
>
> Invocation of the equal protection clause, on the other hand, does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact.[110]

Justice Jackson has a point, but the point is of limited utility if the issue is—as it is for us—the relative finality of judicial review. For equal protection cases vary considerably in the breadth and permanence of the restraints they impose on legislatures. Some equal protection cases are structural in the same way procedural due process cases may be;[111] some are essentially substantive due process cases;[112] some are republican form of government cases,[113] or at least they seem to be when the verbal mask is stripped away. Others, such as the race cases, which involve affirmative governmental discrimination, are final in any realistic sense because they imagine a nation that must be profoundly different from one in which the Constitution would permit the discrimination. Moreover, they entail a remedial program that, while it may not achieve the ideal of racial equality, does substantially rearrange the country's priorities.[114]

Yet even the desegregation cases were initially provisional. The finality we see today reflects today's acceptance of the value derived and articulated as law by the Supreme Court in 1954, namely (with certain qualifications), that government may not affirmatively discriminate on the basis of race. Without today's acceptance there would be no finality; but at the time of decision, such acceptance was in doubt.

In the most substantive of constitutional cases there is always doubt

110. *Id.* at 112.

111. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Griffin v. Illinois, 351 U.S. 12 (1956).

112. *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

113. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

114. These cases begin, of course, with Brown v. Board of Educ., 347 U.S. 483 (1954).

about finality at the time of decision because there is always the possibility of judicial mistake and the inevitability of social change. When we talk of mistake and social change—both terms that need elucidation—we are face to face with questions about the sources of law.

11.

Two types of judicial mistake concern us here. Each is related to a type of justification that a court might offer for a decision. And it is this relationship that connects the topic of judicial mistake with that of the sources of law. Courts—at least appellate courts—generally believe themselves under an obligation to justify what they hold. There are many standard modes of justification: an appeal to a legislative command, to a judicial precedent, to legislative history, or to analogous developments in other jurisdictions or in related areas of law. Moreover, the consequences that may attend a legal rule can sometimes serve as the justification for a judicial decision; so sometimes can an appeal to the moral ideals of the community.

The latter two types of justification are the most problematic in application. And they typically come into play when the more standard modes of justification themselves become problematic. It is fair to conclude, therefore, that they most often give rise to judicial mistake.

The first type of justification is consequentialist; it looks to the future. The rule on which a holding rests will, according to the rationale of the decision, change the behavior of individuals or institutions. The articulated rule serves a policy that in turn is designed to effectuate a societal goal; the justification sounds in terms of benefits and costs.

The second type of justification looks to the past. Its persuasiveness is not in what will be; it does not move us toward a goal. Instead, the rule has persuasiveness because it vindicates a principle embedded in the moral ideals of the community; the justification sounds in terms of rights and obligations.

Of course, the vindication of a principle may have significant effects. Indeed, it may entail—as in desegregation—remedial efforts that change the nature of society. But this does not mean, in this class of cases, that effect should be equated with justification any more than it should be when a court carries out a legislative command by enforcing a statute. There too the decision has an effect, but the justification for the decision does not therefore become its effect; it remains the authority of the legislature.

Earlier I suggested that final responsibility for the moral ideals of the community cannot adequately be lodged in either countermajoritarian institutions with tunnel vision or majoritarian institutions in which the pas-

sionate and self-interested concerns of the moment may prevail too easily. It does not follow, however, that courts—because they are better suited to derive and articulate the community's moral ideals—will not make mistakes in doing so. And, of course, courts are also apt to make mistakes when using forward looking policies to justify their rules; indeed, in the policy area courts have no comparative institutional advantage.

It should be added that the two types of justifications I have adumbrated are hard to discover in pure form in the judicial world. Courts tend to mix them together. And, although they may be easy enough for a philosopher to describe, a lawyer cannot easily separate them. Still, either a forward looking policy or a backward looking principle may be dominant in the explanation of a legal rule. And it behooves us, in trying to understand legal phenomena, to try to draw the distinction. While Cardozo in *The Nature of the Judicial Process* did not explicitly make that effort, his lectures are—as he might have put it—instinct with the idea.

Both policies and principles are important sources of law, including constitutional law. In a formal sense—so far as judicial review is concerned—they, along with history and precedent, give content to the open texture of the Constitution. An example of each will serve to clarify the distinction between them.

12

The major justification for the rule announced in *New York Times v. Sullivan*[115] is a policy. The case held that, absent actual malice,[116] the First Amendment (via the Fourteenth) bars a public official from recovering damages for false and defamatory statements relating to his official conduct. The goal to be fostered through this rule is—at its most abstract—the sound working of American democracy and, at a somewhat reduced level of abstraction, "a commitment . . . that debate on public issues should be uninhibited, robust, and wide-open . . . ."[117] The Court's justification in part took the form that without such a rule, "critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true because of doubt whether it can be proved in court or fear of having to do so."[118] The common law of defamation, the Court reasoned, "dampens the vigor and limits the variety of public debate."[119] The rule, in short, is justified by predictable consequences that serve a desirable goal.

115. 376 U.S. 254 (1964).

116. A defendant is guilty of actual malice if his statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280.

117. *Id.* at 270.

118. *Id.* at 279.

119. *Id.*

Contrast this with the dissent of Justice Brandeis in the famous 1928 case of *Olmstead v. United States.*[120] At issue in that case was whether wiretapping by federal officers constituted an unreasonable search and seizure under the Fourth Amendment. According to Brandeis:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment.[121]

Of course, if Brandeis is "doing" history, he is attributing a great deal to the "makers of our Constitution," given the fact that he is concerned with a contemporary technology in a changed world. But he is not "doing" history in any conventional sense. His is a quest for our community's moral ideals.[122]

One might argue that the rule urged by Brandeis in *Olmstead* is justified by him in much the same way the *Sullivan* rule is justified: in consequentialist or policy terms. That would be mistaken. It would show either an insensitivity to linguistic nuance or a determination to conflate concepts that it is useful, if difficult, to keep separate. In *Sullivan*, the justification for the rule protecting expression looks to the timid behavior of the government's critics, who are faced with the common law of defamation. In *Olmstead*, Brandeis is not concerned directly or principally with the behavior of government officials who authorize wire tapping; his is a concern with the individual's right to be let alone. The rule that he would have had the Court adopt did not depend for its validity upon the subsequent conduct of such officials: less wiretapping was desirable, but the justification for the proposed rule was individual privacy. That right was what Brandeis wished the Court to vindicate. In contrast, the rule that the *Sullivan* Court adopted depends upon the conduct of potential critics of government when released from fear of litigation: an increase in "the vigor and variety of public debate" is not only desirable, it is the justification for the rule. The right of the individual to speak—to exercise his autonomy—is a welcome side effect.

120. 277 U.S. 438, 471-85 (1928).
121. *Id.* at 478.
122. *Cf.* Fiss, *supra* note 39, at 11-12 (role of judge to give content to constitutional values).

This distinction between a forward looking policy justification and a backward looking justification from principles embedded in the moral ideals of the community in turn suggests a distinction between two types of judicial mistake. If it were to become clear that the rule in *New York Times v. Sullivan* did not have the consequences the Court predicted—if it became clear that the behavior of potential critics of government did not change and that "the vigor and variety of public debate" had not been altered—then *New York Times v. Sullivan* would be either a constitutional mistake or, at least, a decision in search of a new justification.

Speaking in a different context and about common-law cases, Cardozo said: "Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void."[123] But what do we mean by "the test of experience"? A plausible answer is social science investigation, empirical research based upon a statistically sophisticated methodology. In addition to *New York Times v. Sullivan*, consider some other subjects—hypothetical and real—for this "test of experience": a constitutional rule excluding the introduction of illegally obtained evidence, justified by the rule's deterrent effect on unlawful police behavior;[124] a constitutional rule requiring at least twelve on a jury, justified by the proposition that the protection afforded the defendant is decreased by a decrease in jury size; a determination that the death penalty is unconstitutional in felony-murder cases, because it fails to deter felony murder. Without in any way implying criticism of the social sciences, one can agree that in at least some of these situations—or others one could think of—scientific tests of experience would not lead to clear conclusions, if indeed scientific tests were possible.[125] Nor is any other "test of experience," such as informed intuition, apt to be better.

This conclusion—that there may be no clear conclusions—raises questions about the use of consequentialist or policy justifications in constitutional law. From this perspective it seems acceptable enough if the evidence on which the policy is based is clear. When it is not, when judges must rely on intuition because social scientists or other data collectors cannot tell them very much about the consequences of legal rules, should not policy choices be left to the legislatures? Should choices not be subject to

123. B. CARDOZO, *supra* note 1, at 22.

124. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Linkletter v. Walker, 381 U.S. 618 (1965).

125. *See, e.g.*, Klevorick & Rothschild, *A Model of the Jury Decision Process*, 8 J. LEGAL STUD. 141 (1979); Levin, *Education, Life Chances, and the Courts: The Role of Social Science Evidence*, 39 LAW & CONTEMP. PROBS. 217 (1975); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

state "laboratories of experimentation" and the trade-offs of national politics?[126]

If this problem is viewed through the lens of judicial mistake, a normal presumption in favor of *stare decisis* should make a judicial declaration of unconstitutionality difficult to reverse because of the difficulty in disproving its empirical assumptions. And unless the societal goals that the policy serves have changed, that is the only proper reason for overruling the decision. Public or political reaction, for example, is not evidence that the exclusionary rule is wrong if the exclusionary rule deters illegal searches and seizures and if deterrence is the reason for the rule. This suggests that forward looking justifications for constitutional rules may be troublesome: either they may have more finality than is healthy for a constitutional solution based on problematic assumptions or they may tend not to endure for improper reasons.

Two caveats: First, the exclusionary rule, as judicial policy, is substantially less troublesome than defamation and the First Amendment because, as noted earlier, it redirects governmental activity without changing the government's goal. In this sense it is far less final than *Sullivan*, which substantially restricts the government's protection of reputation. This may suggest that, when outcomes are problematic, courts should be entitled to use consequentialist justifications only for constitutional rules of a structural or procedural nature. Second, while this discussion should be taken as requiring a justification, not a rationalization, for constitutional rules, it should not be taken as a criticism of the holding in *New York Times v. Sullivan*, or the exclusionary rule cases, or any other constitutional case. It questions only the approach;[127] it is neutral as to results. The exclusionary rule, for example, could perhaps be justified in Brandeisian terms as an aspect of "the privacy of the individual," without regard to its effect on police practices.[128]

14

The second type of judicial mistake is associated with rules that are justified by looking to the past, rules that are persuasive because they vindicate principles embedded in the moral ideals of the community. The Brandeis dissent in *Olmstead* is the example of this second type of justifi-

126. *See* Wellington, *supra* note 40, at 267.

127. "Further, if social science findings increasingly are used to create what appear to be technical issues out of essentially moral dilemmas, this presents a potential social danger." Levin, *supra* note 125, at 240.

128. *Compare* Mapp v. Ohio, 367 U.S. 643 (1961) (emphasizing "Fourth Amendment's right of privacy" as warranting exclusionary rule) *with* Linkletter v. Walker, 381 U.S. 618 (1965) (emphasizing deterrent effect as justification for exclusionary rule).

cation. There Brandeis spoke of the "privacy of the individual." As a constitutional principle—as well as a concept in torts—privacy has had an interesting judicial history. It appears in *Griswold*,[129] the Connecticut contraceptive case, and, of course, in the abortion cases.[130] Some years ago in these pages I concluded, after a detailed analysis, that the 1973 abortion decisions were partially right but overly broad in terms of legal principles derived from conventional morality,[131] and in *The Nature of the Judicial Process*, Cardozo talks of "customary morality"[132] as a source of law. But it seems more in keeping with the conception of the judicial function advanced here to speak about the moral ideals of the community.[133] This is so not because it is easier to get our moral ideals straight, but because that terminology shifts—perhaps ever so slightly—the emphasis from obligation to aspiration. While this shift does not change my estimate of the abortion cases, it may with some issues lead one to slightly different conclusions. However, conventional or customary morality and the moral ideals of the community raise similar problems where, as here, the issue is mistake. This is so because both approaches are—perhaps equally —problematic in result.

It is certainly not difficult to imagine that the moral ideals of the community are often less than scrupulously regarded in the give and take of the legislative process with its necessary compromises, trade-offs, and essential goal orientation. Nor should it be surprising that mistakes occur in the comparatively better situated judicial process. Even the most conscientious judge can get the community's moral ideals wrong.

But what is the criterion here for judicial mistake? What is the meaning of Cardozo's "test of experience" in this context? It does not seem to be empirical investigation. Perhaps it is the community's reaction to a judicial decision.

It is, of course, obvious that the articulation by the Court of the moral ideals of the community is not neutral. The articulation itself has an effect—it is bound to have an effect—on those ideals. What that effect will be—indeed, the direction it will take—is another question, one that is not

129. Griswold v. Connecticut, 381 U.S. 479 (1965).

130. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

131. Wellington, *supra* note 40, at 243-51, 285-311.

132. *See* B. CARDOZO, *supra* note 1, at 104.

133. The notion that a court might use the moral ideals of a community as a bar against the actions of majorities has been much criticized. In particular, it has been claimed that the actions of majorities are the best evidence of communities' ideals, and thus that the latter cannot coherently be said to restrain the former. *See* J. ELY, *supra* note 7, at 69 ("It makes no sense to employ the value judgments of the majority as a means of protecting minorities from the value judgments of majorities.") This criticism, however, overlooks the familiar fact that communities, like individuals, may well violate principles to which they usually adhere. Such inconsistency is most likely in the legislative process, when self-interest is least neutralized by considerations of conscience or moral obligation.

susceptible to a general answer. Yet we do know that when the Justices get the community's moral ideals wrong in constitutional cases, they hear about it. Of course it is also the case that when they get them right they hear about it.[134] In both situations there may be turmoil, resistance, and threats from other governmental entities, from private groups, institutions and individuals. There is always discussion and analysis; some of it may even be informed and dispassionate. All of it helps to clarify.

Contemporary historical examples might begin with the Court and the New Deal,[135] and continue with *Brown v. Board of Education*.[136] That case gave rise to a heightened level of political activity that was sustained for years and that includes, on the one hand, such unforgettable events as the Southern Congressional Manifesto[137] and the opposition to integration at Little Rock,[138] and, on the other, the heroic activities that constituted the civil rights movement.[139] Moving on in time, the political unrest asso-

134. Consider, as related to the theme I am developing, Andrew Jackson's veto message of July 10, 1832 on a bill to recharter the Bank of the United States:

> It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.

Jackon's message is reproduced in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576 (Richardson ed. 1896). *But cf.* Cooper v. Aaron, 358 U.S. 1 (1958) (Court is supreme arbiter of Constitution). Had *Cooper* been decided in 1832, Jackson could not have fashioned his argument in the manner presented above: that all officers of government are bound by the judgments of the Supreme Court would not have been a matter open to debate. But Jackson's argument could have been reshaped. As Bickel noted, decisions of the Supreme Court, unlike the injunctive order at issue in *Cooper*, *see infra* note 138, are not self-executing. *See* A. BICKEL, THE MORALITY OF CONSENT 111 (1975). The legal freedom thus accorded parties not bound by concluded litigation may well, like any freedom, be abused. But there is no reason to suppose that private resistance to constitutional decisions is always or usually invidiously motivated; nor is there reason to assume the infallibility of the courts.

135. *See supra* note 3.

136. 347 U.S. 483 (1954).

137. The "Southern Manifesto" was a document signed by 101 Congressmen from Southern states. The document maintained that *Brown v. Board of Education* was an abuse of judicial power, and expressed its signers' intention to reverse the decision. Pursuant to the Manifesto's purpose, legislatures in the South sought to evade integration decrees by, among other things, closing schools, providing tuition grants for private education, and establishing "freedom of choice" attendance plans. *See* H. HOROWITZ & K. KARST, LAW, LAWYERS, AND SOCIAL CHANGE 256 (1969).

138. Governor Faubus of Arkansas had relied on the threats of violence made by groups opposed to integration to justify a failure to comply with remedial injunctions ordering desegregation. In Cooper v. Aaron, 358 U.S. 1 (1958), the Supreme Court cut short the governor's attempts to evade the rule of Brown v. Board of Education, 347 U.S. 483 (1954), holding that desegregation decrees must be enforced, local hostility notwithstanding. *See also* R. COLE, CHILDREN OF CRISIS 111, 373 (1967); A. GRIMSHAW, RACIAL VIOLENCE IN THE UNITED STATES 448, 520 (1969), R. KLUGER, SIMPLE JUSTICE 223, 747, 754 (1975).

139. *See, e.g.*, D. BATES, THE LONG SHADOW OF LITTLE ROCK 69-76 (1962) (discussing treatment of "Little Rock Nine"); D. GARROW, PROTEST AT SELMA 133-61 (1978); C. KING, MY LIFE WITH MARTIN LUTHER KING JR. 188-207 (1969) (discussing impact of sit-ins and freedom riders); M. KING JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY (1958) (discussing successful boycott of Montgomery bus system).

ciated with the abortion cases[140] includes sophisticated election tactics by highly visible "right-to-life" and "freedom-of-choice" groups, campaign rhetoric at every level, and efforts at constitutional amendment[141] and legislative nullification.[142]

When the Justices are right about the moral ideals of the community, their decisions become settled and accepted. The turmoil, the resistance, and the threats from other governmental entities, from private groups, institutions and individuals diminish with time. Thus, few today can be heard to endorse government supported racial segregation or other state practices that discriminate against blacks.

When the Court is wrong, criticism and analysis help to reveal the mistake—so do the turmoil, the threats, the approval and the resistance, from all the sources that make up our community. Remember, it is the moral ideals of the community and not of the wise philosopher that concern the Court. And it is a wise court that pays attention to the community—not out of fear, but out of obligation.[143]

When the Court recognizes that it has made a mistake, it should, in the appropriate case, rectify the situation. Needless to say, there is no rule in constitutional law, any more than there is a rule at common law, to tell a court when to disregard or modify a precedent. The subject is difficult and no generalization is readily apparent. It is instructive, however, to consider some aspects of the Court's handling of the abortion issue since its

140. For a discussion of the political reaction to *Roe v. Wade* and *Doe v. Bolton,* see Rubin, *The Abortion Cases: A Study in Law and Social Change,* 5 N.C. CENT. L.J. 215, 247-53 (1974). *See also* DeWitt, *Abortion Foes March in Capitol on Anniversary of Legislation,* N.Y. Times, Jan. 23, 1979, at C1, col. 1; N.Y. Times, April 24, 1981, at A16, col 1.

141. *See, e.g.,* S.J. Res. 110, 97th Cong., 1st Sess. (1981) (proposed constitutional amendment permitting Congress and states to legislate with respect to abortion); H.R.J. Res. 372, 97th Cong., 1st Sess. (1981) (same); S.J. Res. 19, 97th Cong., 1st Sess. (1981) (proposed constitutional amendement guaranteeing "right-to-life" to unborn); H.R.J. Res. 32, 97th Cong., 1st Sess (1981) (same).

142. *See, e.g.* S. 158, 97th Cong., 1st Sess. (1981) (declaring human life to begin at conception); H.R. 900, 97th Cong., 1st Sess. (1981) (same). *See also* S. 9583, 97th Cong., 1st Sess. (1981) (limiting jurisdiction of federal courts to hear abortion cases); H.R. 73, 97th Cong., 1st Sess. (1981) (same).

143. Is this not the flip side of the following segment of President Lincoln's First Inaugural Address, delivered on March 4, 1861?

> I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the government. And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hand of that eminent tribunal.

2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 494 (Basler ed. 1953).

1973 decision in *Roe v. Wade*,[144] for the Court seems to have some, perhaps as yet only partially conscious, sense that its decision to permit abortions freely was overly broad, and, in that respect, a mistake. The Court itself has, indirectly and perhaps unknowingly, retreated in some subsequent cases by distinguishing its 1973 holding.

In *Maher v. Roe*,[145] decided in 1977, the Court sustained a Connecticut welfare regulation denying Medicaid recipients payments for medical services related to nontherapeutic abortions. And in the summer of 1980, in *Harris v. McRae*,[146] the Court upheld the Hyde Amendment's prohibition on the use of federal Medicaid funds for abortion, "except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest . . . ."[147]

Since *Roe v. Wade* had held unconstitutional a statute making it a crime to "procure an abortion," except to save the life of the mother,[148] it might seem sufficient for the Court to point out, as it did, the "basic difference between direct state interference with [a woman's freedom of choice which, under *Roe v. Wade*, is absolute during the first trimester of pregnancy] and state encouragement of an alternative activity consonant with legislative policy,"[149] namely, carrying the fetus to term. The trouble with this is that the holding in *Roe v. Wade* rests on the premise that the morality of an abortion is none of the government's business, while the Connecticut welfare regulation and the Hyde Amendment represent governmental decisions against a woman's freedom of choice based exclusively on the proposition that government assistance for all but a limited class of abortions is immoral. There can be no other explanation for the Connecticut regulation and the Hyde Amendment. Those governmental decisions were not taken to save money: medical services incident to childbirth are generally more expensive than abortion. Nor is there any reason to imagine that they were taken because of a direct governmental commitment to population growth.[150]

The Connecticut welfare regulation and the Hyde Amendment reflect

144. 410 U.S. 113 (1973).
145. 432 U.S. 464 (1977).
146. 448 U.S. 297 (1980).
147. *Id.* at 301-02.
148. 410 U.S. 117-18.
149. 448 U.S. at 315 (citing Maher v. Roe, 432 U.S. 464, 475-76 (1977)).
150. *Cf.* 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, 1122-26 (1980) (Hyde Amendment unconstitutional because "motivated" by view that abortion is immoral). On the proper role of legislative motivation in constitutional adjudication, see Brest, Palmer v. Thompson: *An Approach to the Problems of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). *See also* J. ELY, *supra* note 7, at 136-48.

an understanding of the moral ideals of the community different from the understanding that informs *Roe v. Wade*. By sustaining the constitutionality of these two provisions, the Court has undermined the foundation for the rules it announced in *Roe v. Wade*. It has implied that its earlier understanding of the moral ideals of the community was mistaken. *Roe v. Wade*, accordingly, should be seen as a shaky precedent, and the Court should see itself as under an obligation to reexamine the breadth of that 1973 decision.[151]

Indeed, there is reason to believe that this process has begun. In the *Matheson* case,[152] decided in March of 1981, the Court sustained the constitutionality of a Utah statute at least to the extent that it required a physician, "if possible," before performing an abortion, to notify the parents of a minor who could not show special circumstances[153] and was living at home. The case involved a fifteen-year old in the first trimester of pregnancy. She consulted a social worker and a physician. The physician advised her that an abortion was in her best medical interest. She agreed but did not wish to notify her parents, a decision with which her social worker agreed. On these facts it seems that the Utah law burdened the pregnant young woman's right to choose, with the advice of her physician, whether to terminate her pregnancy. That is a right that *Roe v. Wade* seemed to grant.

Once again, two caveats: First, whatever the Court believed it was doing in the *Matheson* case, it may not have realized that the Connecticut and Hyde Amendment cases constituted a retreat from *Roe v. Wade*. But if the Court did, it can have no pride in its method. The Court should not have begun to undo its mistake by sustaining a limitation of choice imposed on poor women, without explicitly modifying the 1973 decision.

Second, and more generally, some may say that the views expressed here foster disrespect for law, because the doctrine of mistake in judicial review implies that it is legitimate, as a political matter, to resist the decisions of the Supreme Court. While my views, if articulated by the Court, would be apt to increase political activity both against and for the Court,

151. This does not mean that there is nothing to the distinction between direct state interference with a woman's freedom of choice and state encouragement of the way in which she exercises that freedom. It does mean that *Roe v. Wade* is too broad, given the Court's subsequent conclusion that a legislature has the constitutional authority to effectuate the proposition that government assistance, for all but a limited class of abortions, is immoral.

152. H.L. v. Matheson, 450 U.S. 398 (1981).

153. Although the Court assumed that the statute did not apply to "emancipated" or "independent" minors, *id.* at 406-07, this narrowing construction may well fail to constrain the statute's actual reach. To avoid the parental notification requirement, a minor must first convince her doctor that she is "emancipated" or "independent." It is not unreasonable to assume that doctors, lacking any clear standard against which to judge their patients' maturity, and subject to criminal and civil sanctions if their judgment regarding "emancipation" is later reversed, would err on the side of parental notification.

there is as much reason to think that this would be good as to suspect that it would be bad. Moreover, and more importantly, increased political activity over Supreme Court decisions does not constitute disrespect for law. Our law must be based on consent. It is everyone's obligation to insist that all branches of government, including the courts, remain true to this central understanding.[154] Peaceful resistance is part of the minorities' arsenal of weapons against the majority.[155] It is a standard political weapon of minorities and the majority against the Court.[156]

15

It is time to examine where we are and what judicial review looks like from this position. It comes to this: concern with judicial review is exaggerated if—as is generally the case—the concern focuses on the countermajoritarian nature of the practice. Concern is appropriate, however, if prompted by the apparent finality of constitutional decisions. It is not helpful, in trying to alleviate this concern, to seek to insulate the Court from the realm of values by limiting judicial review to diagnosing and curing the process malfunctions of other governmental entities. That approach fails to remove the Court from the realm of values and unwisely excludes it from areas of substantive malfunctions.

The key to mitigating concern with judicial review is found when one analyzes the concept of finality and relates it to the judicial process. Many constitutional decisions deal with means and not ends. Accordingly, they are often less final than might be supposed. Moreover, because value determinations of either the policy or the principle variety are problematic, judges are apt to make mistakes. But, at least where principles are involved, mistakes can be discovered and mistaken decisions amended by normal judicial processes.[157]

154. *See* H. ARENDT, *Civil Disobedience*, in CRISES OF THE REPUBLIC 51, 51-57 (1972). *See also* A. BICKEL, *supra* note 8, at 244-72.

155. My views on this are developed to some extent in Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1136-42 (1979).

156. *See supra* pp. 1, 515-16. Justice Jackson was surely correct when he said, in *Brown v. Allen*, "We are not final because we are infallible . . . ," 344 U.S. 443, 540 (1953) (concurring in the results), and just as surely incorrect when he continued, "but we are infallible only because we are final." *Id.* In fact, the Justices are neither final nor infallible.

157. A remaining question concerns the relationship between the techniques of avoidance, or "passive virtues," *see* Bickel, *supra* note 8, at 111-98, and the arguments concerning the judicial function presented here. That relationship has been touched upon in the discussion of the delegation, void-for-vagueness and overbreadth doctrines and in some of the analysis of statutory interpretation. Moreover, where severe social flux imposes particular difficulty on the judicial task I have described, the use of techniques of avoidance may seem attractive. In such circumstances the danger of judicial mistake may be substantial. But there are difficulties with this approach if carried as far as Bickel proposes. Quite apart from the familiar criticisms, *see* Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964), one might ask whether passive avoidance is as non-intrusive as commonly supposed. Deliberate passivity, after all, seeks to shift responsibility by placing burdens on other institutions. Some of

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Mistake might seem a relatively static concept that should be contrasted with growth and change or—if one is optimistic—progress in constitutional law. But the distinction is not sharp because mistaken judicial decisions affect the moral ideals of the community in ways that defy generalization. And the ensuing political unrest in turn affects the law. At any rate, the question of growth and change, as a discrete question, has been much remarked.[158] If there is anything new to say about it, it would best be left for another time. Let me only observe, and with this observation close: growth, change, and progress are inconsistent with finality in any strong sense; nor is there reason to suppose that they present problems in understanding the nature of the judicial process that can be ignored in attempting to understand the nature of judicial review.

the time, and in some situations, those institutions may be ill-suited to perform the additional task. Bickel, of course, was moved to his position, at least in part, by his anxiety over the countermajoritarian nature of judicial review. If one is less worried about this, perhaps one can afford to worry more about the misallocation of institutional responsibility that may be entailed in the otherwise questionable avoidance of a constitutional decision.

158. In *The Nature of the Judicial Process, supra* note 1, Cardozo's central concern is with growth, change, and progress.

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