1995

Even More Honest Than Ever Before: Abandoning Pretense and Recreating Legitimacy in Constitutional Interpretation

Leslie Gielow Jacobs
Pacific McGeorge School of Law, ljacobs@pacific.edu

Follow this and additional works at: http://scholarlycommons.pacific.edu/facultyarticles

Part of the Supreme Court of the United States Commons

Recommended Citation
EVEN MORE HONEST THAN EVER BEFORE: ABANDONING PRETENSE AND RECREATING LEGITIMACY IN CONSTITUTIONAL INTERPRETATION

Leslie Gielow Jacobs*

In this article, Professor Leslie Gielow Jacobs asserts that the Supreme Court, by becoming mired in a formalistic mode of reporting decisions, has sacrificed the legitimacy of its interpretive process. She argues that this sacrifice stems from contemporary Supreme Court opinions' failure to acknowledge alternatives and value judgments that inevitably are a part of decision making. She explores several recent decisions by the Court, noting the detrimental impact of formalism in each. Professor Jacobs then suggests a new method of reporting, defining, and structuring its components into a method which can recreate legitimacy in the interpretive process.

I. Introduction

Almost one hundred years ago, Justice Oliver Wendell Holmes, Jr., noted that the "logical form" in which courts deliver judicial opinions conceals an "often . . . inarticulate and unconscious judgment" which, instead of the reasons the courts recite in the opinions, is "the very root and nerve of the whole proceeding."1 Despite this astute observation, little in the presentation of constitutional decision making has changed.2 By contrast, the widely shared foundational assump-
tions that could make this type of logical presentation meaningful no longer exist. This divergence between judicial practice and modern recognitions has profound constitutional implications. Although the Supreme Court acknowledges that public acceptance of its constitutional decisions is crucial to its legitimacy, it remains wedded to a method of presenting these decisions that has become increasingly untenable and, perhaps, incredible. The resulting—and worsening—crisis of legitimacy stems from the disjunction between the rhetoric of the Court's opinions and the necessary reality of the constitutional decision-making process.

The question of legitimacy is, quite simply, why should the nation—lawyers or laypeople—continue to respect and follow the constitutional meanings articulated by as few as five individuals who happen to sit on the Supreme Court? The traditional response to this question is twofold. First, the Constitution, a document of democratic pedigree, the general scheme of which we continue to affirm, quite plausibly commits the function of interpreting the Constitution to the judiciary. Second, judges, a particularly high breed of lawyer, have expertise superior to laypeople in examining the sources of constitutional meaning—the text, its history, and previous cases interpreting it—so the constitutional meanings that they articulate are especially likely to be correct. These reasons have been thought to render the Court's constitutional decisions worthy of respect and obedience, even by those individuals who may disagree with a particular result.

3. See, e.g., Morton J. Horowitz, The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 HARV. L. REV. 30, 33 (1993) (“As law in the modern world has increasingly cut itself loose from its once-powerful grounding in religious sources of authority, it has been challenged to acknowledge, along with every other secular field of knowledge, the implications not only of historical change, but also changes in historical consciousness.”) (citation omitted).


5. Others also have seen a crisis brewing. See Id. at 2885 (Scalia, J., dissenting) (comparing the Court's decision to the Dred Scott decision that led to the Civil War); Horowitz, supra note 3, at 33; Sanford Levinson, Law as Literature, 60 TEX. L. REV. 373, 401-02 (1982) (“The decreasing propensity of the body politic to accord the Supreme Court ultimate authority in constitutional interpretation may portend a[... ] deep[ ] constitutional crisis.”).

6. This pedigree, however, is not perfect. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 38 (2d ed. 1991) (“[T]he 'we' [who participated in the democratic formation of the Constitution] excluded large numbers of people, including all women, all Indians, and all blacks.”).

7. See infra note 46.


9. BICKEL, supra note 8, at 25-26 (“[C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government.”).
The traditional model of judicial reasoning is formalism—that is, decision makers deduce constitutional meanings from acknowledged authoritative sources, which themselves have determinate meanings.\(^{10}\) Formal legitimacy addresses the crucial concern that unelected constitutional decision makers interpret the law rather than make the law according to their own personal preferences.\(^{11}\) It also demonstrates that the decision is entitled to respect and obedience because the foundations that lead to the more particular decision are presumptively affirmed by all.\(^ {12}\)

The modern dilemma is that formalism, as the sole test of the legitimacy of the constitutional interpretive process, is no longer tenable.\(^{13}\) All constitutional interpretation requires value judgments.\(^{14}\) Where the value judgments will be most obvious, however, is where they are most hotly disputed.\(^{15}\) It is, of course, in these instances of deep controversy that the Court needs most to maintain the legiti-

---

10. See, e.g., STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 169 (1985) ("The classical interpretation of the demand for legitimacy treats it as a demand for legal formalism in adjudication."); Richard A. Posner, Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution, 37 CASE W. RES. L. REV. 179, 181 (1986) (defining formalism as "the use of deductive logic to derive the outcome of a case from premises accepted as authoritative").

11. See BURTON, supra note 10, at 169 ("The ... model of formal legitimacy ... relies on logic to exclude all personal value preferences from the judicial decision.").

12. See, e.g., Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1972); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959); see also RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 40 (1990) ("The only prerequisite to being a formalist is having supreme confidence in one’s premises and in one’s methods of deriving conclusions from them").

13. My point is not, as some have argued, that logical reasoning is useless as a means of legitimating constitutional decisions. See David Kairys, Law and Politics, 52 GEO. WASH. L. REV. 243, 243-51 (1984); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1691-700 (1976); Pierre Schlag, Rules and Standards, 33 UCLA L. REV. 379, 400-18 (1985); Joseph W. Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 9-25 (1984); Roberto M. Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561, 570-72 (1983). Reliance upon principles in constitutional decision making and the discipline of stating them in the judicial opinion help demonstrate the decision’s legitimacy. See infra part IIA; see also KENT GREENAWALT, LAW AND OBJECTIVITY 13-56 (1992); Frederick Schauer, Formalism, 97 YALE L.J. 509, 510 (1988) [hereinafter Schauer, Formalism] (arguing that “formalism”—meaning “decisionmaking according to rule”—should not be categorically condemned). My point is simply that a formal justification in a judicial opinion is not always enough to demonstrate its legitimacy. Even those who argue that judicial reliance on formalism can be valuable tend to concede this. See, e.g., Rolf Sartorius, The Justification of the Judicial Decision, 78 ETHICS 171, 173 (1968), reprinted in 1 LEGAL REASONING 127, 129 (Aulis Aarnio & D. Neil MacCormick eds., 1993) ("I have no quarrel with the view that ... principles of ‘morality, justice, social policy or commonsense’ ... can provide grounds for the justification of judicial decisions in hard cases."); Frederick Schauer, Easy Cases, 58 S. CAL. L. REV. 399, 407 (1985) [hereinafter Schauer, Easy Cases] (acknowledging that some cases are “hard”).

14. See, e.g., CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 101 (1993) ("There is ... no way for those interpreting the Constitution to avoid moral decisions, even major ones.").

15. See Schauer, Formalism, supra note 13, at 514 (noting that "terms, like 'liberty' and 'equality' are pervasively indeterminate").
macy of its decisions, particularly as against those many individuals who passionately disagree.\(^16\)

The modern recognition of the inevitability of value judgments in constitutional adjudication, coupled with the traditional assumptions about the formal requirements of legitimacy, creates the Court's current contradictory and potentially self-destructive behavior. "[L]egitimacy," as the Court has recognized, "is a product of [both] substance and perception."\(^17\) As for the substance of the Court's constitutional interpretation, I do not think that any member of the Court today really believes that it meets the requirements of formal legitimacy. Rather, I am convinced that the Justices know that they must make value judgments in interpreting the Constitution.\(^18\)

Moreover, while the Justices most likely do—and, I think, should—believe that their constitutional interpretations are "correct," I doubt they view them as uniquely so. Instead, they attempt to reach the best possible result in the face of complex and conflicting potential meanings.

My concerns stem initially from the contradiction between these intuitions about the substance of the Court's constitutional interpretive process and its manner of attempting to create the perception of interpretive legitimacy. The vehicle by which the Court communicates with the American public is the judicial opinion, which demonstrates the legitimacy of the decision by "bear[ing] witness that it was reached through the discipline of the pattern of the law."\(^19\) Although I suspect (and hope) that the Justices have abandoned the idea of formal legitimacy as the model of constitutional interpretation, they most certainly have not done so in the explanation of their decisions. Their decisions consistently portray the constitutional meanings as flowing inevitably from the traditional sources of meaning, and deride

---

16. See David Lyons, Justification and Judicial Responsibility, 72 CAL. L. Rev. 178, 198 (1984) ("[W]hat needs to be justified is . . . what we do to people who are governed by the law.")


18. For example, many constitutional decisions turn on the result of balancing a number of different factors. See, e.g., T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 944 (1987). But the Constitution neither dictates the tests nor indicates how to quantify the factors in any given context. Nor does it assign numerical multipliers to these factors once we have (somehow) measured their magnitude. It is difficult to deny that value judgments drive the quantification of these factors and the inherent multipliers we assign to them. I suspect that the Justices, perceptive and intelligent all, do not deny this, at least to themselves. See, e.g., Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 Cal. L. Rev. 1049, 1065 (1979). Bennett notes:

Usually there will be no way to quantify or otherwise objectify . . . cost-benefit balancing [under the Equal Protection Clause]. . . . To recognize that rationality is a function of costs, benefits, and alternatives is to recognize that judicial value judgments at some level are unavoidable even when applying [the] most minimal of constitutional standards.

Id.

alternate interpretations offered within the same decision as misguided or incorrect. To me, most recent constitutional decisions look like shouting matches rather than the honest and thoughtful explanation more likely to engender the respect and willingness to obey that legitimacy requires.\textsuperscript{20}

The much more dangerous aspect of the contradiction between the Court's method and its presentation, however, is that the formalist assumptions as to presentation doom the Court to fail by its own standards and prejudge the interpretive method that will appear most plausible.\textsuperscript{21} Originalists have repeatedly accused the Court of simultaneously obscuring the value judgments it makes in its constitutional interpretation and arguing that its chosen method of interpretation defines "the exclusive source" for principles of interpretation "that are independent of the judge's preferences."\textsuperscript{22} These accusations of deception will be correct and will undermine respect for the Court's decisions as long as the Court adheres to the formalist assumptions of presentation. Moreover, these assumptions will channel the Court's decision-making method toward the sources of meaning advocated by originalists, thereby obscuring the value judgment to rely upon these sources in the first place.

For those of us who believe that originalist assumptions about constitutional interpretation often do not promote the best constitutional meaning, it is particularly important to break this self-defeating cycle by exposing the value judgment to rely upon those sources of meaning for what they are. The Court must abandon the pretense that formalism can legitimate completely its decision making and accept the challenge of legitimating its constitutional value judgments by other methods.

I suspect that the Court clings to a formalist method of presentation not so much because of its perceived effectiveness, but because it lacks a plausible alternative.\textsuperscript{23} In this article, therefore, I propose a method of constitutional decision making and presentation that explicitly embraces, rather than implicitly denies, the inevitable value judgments. Part II uses several recent constitutional decisions to illustrate the ways that the formalist assumptions apparent in the Court's opin-

\textsuperscript{20} See Jerome Frank, Law and the Modern Mind 75 (1930) (speculating that the authoritarian tone of judicial decisions stemmed from the childish need for an omnipotent authority figure); Posner, supra note 2, at 834 (noting that "judges' persistence in trying to force legal reasoning into the mold of logic... suggests... a kind of desperation").

\textsuperscript{21} See Charles Taylor, Sources of the Self 103 (1989) (Most modern philosophies "prejudge [visions of the good] irrevocably... not because they are inspired by one side but because this inspiration is hidden, where it can't come up for debate.").


\textsuperscript{23} See Posner, supra note 2, at 834 (asserting that judges' continued adherence to formalism in judicial opinion writing "suggests a lack either of confidence or sophistication in alternative modes of reasoning").
ions undermine its constitutional interpretive legitimacy. Part III sets out the components of a new legitimacy that the Court can obtain despite the fact that it must make controversial value judgments in constitutional adjudication. Part IV combines these components into a structured method of decision making that, when followed and set out in the Court’s opinions, can earn the Court the legitimacy it so desperately seeks.

II. THE CONTRADICTION BETWEEN THE RHETORIC AND THE REALITY OF CONSTITUTIONAL INTERPRETIVE LEGITIMACY

The Supreme Court’s decision in Planned Parenthood v. Casey24 contains its most recent and thorough explication of its view of its own constitutional interpretive legitimacy. Casey therefore provides an excellent starting point for an examination of the widening gulf between the Court’s view and the necessary reality of constitutional interpretive method. In a joint opinion, a plurality of the Court affirmed the “central holding” of Roe v. Wade25 that the “liberty” guarantee of the Fourteenth Amendment Due Process Clause includes a woman’s right to choose to have an abortion.26 According to the members of the Court, the decision whether to affirm the constitutional interpretation established in Roe raised questions of “legitimacy.”27

The Court’s legitimacy is the “source of [its] authority”28 and is “a product of [both] substance and perception.”29 The substance of the Court’s legitimacy is “the warrant for the Court’s decisions in the Constitution and the lesser sources of legal principle on which the Court draws.”30 The perception of legitimacy comes from the expression of its substance in “the Court’s opinions.”31 By making “legally principled decisions” and displaying their “principled character” in judicial opinions, the Court can preserve its legitimacy and, hence, its authority “to determine what the Nation’s law means and to declare what it demands.”32

The Court’s description of the substance and perception of legitimacy reflects some widely shared understandings. Substantively, the

24. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2796 (1992) (plurality opinion of Justices O’Connor, Kennedy, and Souter); id. at 2855 (Rehnquist, J., concurring in the judgment in part and dissenting in part); id. at 2873 (Scalia, J., concurring in the judgment in part and dissenting in part).
26. Casey, 112 S. Ct. at 2816 (plurality opinion).
27. Id. at 2814 (plurality opinion).
28. Id. (plurality opinion).
29. Id. (plurality opinion).
30. Id. (plurality opinion).
31. Id. (plurality opinion).
32. Id. (plurality opinion).
issue of legitimacy arises because of the nature and limits of "the power conferred by the Constitution upon the Judiciary of the United States and specifically upon [the Supreme] Court."33 In our constitutional democracy, laws must be created democratically. Because members of the judiciary are not elected, they cannot make law legitimately. Instead, they interpret the meanings of laws which another branch of government has created democratically. Thus, the crux of interpretive legitimacy is that constitutional decision makers stay within their authorized role of interpreting the meaning of the Constitution;34 their decisions must be fairly traceable to the constitutional text. In a "[n]ation of people who aspire to live according to the rule of law,"35 the content of the "law" must be fairly distinguishable from the decision makers' personal preferences.36 Consequently, constitutional meaning which fluctuates with "change[s] in [the Court's] membership"37 would severely damage the Court's legitimacy. The Court's function is "to define the liberty of all, not to mandate [its] own moral code."38 The Casey plurality, therefore, reached its result despite any "personal reluctance" of particular Justices.39

Although legitimacy in constitutional interpretation requires this transcendence of personal preference, it also requires a transcendence of generational preference; the Constitution embodies "ideas and aspirations that must survive more ages than one."40 Constitutional principles similarly must be acceptable and affirmative by the broad public

33. Id. (plurality opinion).
35. Casey, 112 S. Ct. at 2816 (plurality opinion).
36. See, e.g., id. at 2806 (stating that the process of supplying content to constitutional text "has not been one where judges have felt free to roam where unguided speculation might take them") (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)); id. at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part) (accusing the Court of "not wish[ing] to be fettered by any . . . limitations on its preferences"); BICKEL, supra note 8, at 16 (noting the potential countermajoritarian difficulty of judicial review); Bork, supra note 12, at 8 (noting the Court's willingness to abandon the idea of original understanding); Stephen M. Feldman, Republican Revival/Interpretive Turn, 1992 Wis. L. Rev. 679, 704 (noting the problem where "Justices inevitably seem to impose their personal values on society"); Owen M. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 HARV. L. REV. 1, 12-13 (1979) (asserting that judicial interpretation should not rely on "personal beliefs"); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 800 (1983) (noting the Court's rejection of the Framers' intent of the Fourteenth Amendment in Brown v. Board of Education).
37. Id. at 2814 (plurality opinion) (quoting Mitchell v. W.T. Grant, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting)).
38. Id. at 2806 (plurality opinion).
39. Id. at 2812 (plurality opinion).
40. Id. at 2833 (plurality opinion); see also BICKEL, supra note 8, at 58 (the function of judicial review is to "enunciat[e] and apply[] certain enduring values of our society"); Owen M. Fiss, Objectivity and Interpretation, 34 STAN. L. REV. 739, 762-63 (1982) ("[T]he Constitution . . . embodies the fundamental public values of our society.").
that is subject to constitutional commands. Of course, this broad public does not necessarily mean the momentary popular majority. Fundamental and enduring principles must differ somehow from the political preferences of the day or they would establish no limit at all on the actions of the other governmental branches.

Fidelity to the broad principles understood to be embodied in the Constitution is thus one aspect of the legitimacy of constitutional decisions. Another aspect of that legitimacy, however, is that the principles used in constitutional decision making have continuing significance in the present day. That is, continuing allegiance to constitutional decisions, like our more general allegiance to the structure of government, depends upon a general public perception that the Constitution and the meaning the Court gives it are generally valuable, despite the inevitable disagreement of some with any particular decision.

Up to this point, the Court offers a widely affirmed definition of the substance of its constitutional interpretive legitimacy. Its essence is that the Court should interpret the Constitution according to legal constraints rather than personal preferences and in a way worthy of continuing respect. But in its assumptions about the requirements to establish the second aspect of legitimacy—its public perception—the

41. Casey, 112 S. Ct. at 2814 (plurality opinion) (Legitimacy "shows itself in the people's acceptance of the Judiciary" and the "principled justifications" it offers).
42. This point is particularly apposite with respect to constitutional provisions that protect minority rights. See, e.g., John H. Ely, Democracy and Distrust 7 (1980) (noting that majority rule "is not the whole story"); see also Casey, 112 S. Ct. at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part) (finding it "upsetting" that the meaning of the Constitution might depend upon "some kind of social consensus"); Muller v. Oregon, 208 U.S. 412, 420 (1908) ("Constitutional questions... are not settled by even a consensus of present public opinion.").
43. See, e.g., Ely, supra note 42, at 7.
44. See, e.g., Farber, supra note 34, at 1086 ("Almost no one believes that the original understanding is wholly irrelevant to modern-day constitutional interpretation."); Michael J. Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitution "Interpretation," 58 S. Cal. L. Rev. 551, 569-70 (stating that the issue that divides originalists and nonoriginalists is whether "to accord [the ratifiers' normative judgments] authoritative status").
45. See, e.g., Sunstein, supra note 14, at 100 (suggesting that constitutional legitimacy comes from "some amalgam of substantive political reasons"); Robin L. West, Constitutional Skepticism, 72 B.U. L. Rev. 765 (1992) (suggesting that we ask whether the values which the Constitution embodies are good ones, worthy of respect and continued allegiance); see also Bruce A. Ackerman, Discovering the Constitution, 93 Yale L.J. 1013, 1023, 1049 (1984) (noting the intertemporal difficulty of giving effect to the will of a majority now dead); Kenneth L. Karst, Woman's Constitution, 1984 Duke L.J. 447, 446 (asserting that the Constitution designed a framework for governing society as it was perceived by men and run by men); Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 856-61 (1989) (acknowledging that, in some instances, originalism may result in meanings that are unacceptable, even to originalists, in the present day).
46. See, e.g., Burton, supra note 10, at 201 (stating that in assessing legitimacy, "the normative question—whether the legal and political system as a whole merits the allegiance of the people—is also important.").
Court establishes the contradiction that is bound to destroy the legitimacy that it seeks to demonstrate.

Clearly, an important function of the judicial opinion is to create the perception of interpretive legitimacy. In particular, the written opinion demonstrates that the decision "is not just a bald exercise of coercion," or "an expression of the judge's personal predilections." Rather, the written decision "bear[s] witness that it was reached through the discipline of the pattern of the law." Even if the opinion does not reflect the decision maker's actual reasoning process, the exercise of creating the opinion provides an important constraint on the decision maker's ability to reach any desired result. Moreover, the judicial opinion functions not only to demonstrate that something constrained the decision-making process, but also that the constraints were appropriate. Thus, displaying the decision-making process in the judicial opinion enhances its legitimacy both by demonstrating the difference between the result and the decision maker's personal preferences, and by offering the display as worthy of public respect.

The damaging contradiction derives from the assumption, apparent in the opinions of all the Justices, that creating the perception of legitimacy requires a presentation that portrays the decision-making process as meeting the demands of formalism. Quite briefly, formal legitimacy requires that decision makers logically derive their decisions from foundational authorizing principles, which have a legitimating pedigree. In its strongest form, the theory provides that only "one right answer" exists to many, or most, legal questions.

47. Martin P. Golding, Legal Reasoning 6-10 (1984); see also Levi, supra note 19, at 411 ("[T]he function of articulated judicial reasoning is to . . . give[e] some assurance that private views are not masquerading behind public views.").


50. Golding, supra note 47, at 9 ("[R]easons . . . operate as controls on the process of deliberation.").

51. Id. ("The reasons will have to be regarded by [the audience] as good reasons for the decision.").

52. Id. Golding writes: The fact that rational individuals are not persuaded by just any reasons that a judge could conceivably give has an important consequence: the reasons have to be more than an expression of the judge's personal predilections. . . . [T]he judge will want his or her reasons to be reasons that independent observers, especially other judges and lawyers, will find acceptable. Id.

53. See, e.g., Burton, supra note 10, at 170 (Formal legitimacy "often is taken to define legitimacy for adjudication in the U.S. legal system."); Michael S. Moore, The Semantics of Judging, 54 S. Cal. L. Rev. 151, 160 ("[F]ormalism is central to our ideas of law."); Posner, supra note 2, at 832.

54. See sources cited supra note 10.

legitimacy further requires that decision makers determine the Constitution's meaning by reference to its text and history. These foundational meanings, assuming that the decision makers can discern them accurately, legitimate the decisions as properly grounded in the Constitution, independent of the decision makers' preferences, and worthy of continuing respect.

I am quite sure that none of the Justices really believe that the Court's constitutional interpretation process, at least in difficult cases, can meet the demands of formal legitimacy. Instead, formalism is a theory of interpretation that has been widely acknowledged as impossible to achieve. It is an illusion that was sustainable in a time of widespread belief in eternal and discoverable universal truths, when the citizenry deemed appropriate to evaluate constitutional interpretive legitimacy was relatively homogenous. Now, however, almost everyone agrees that the traditional sources of constitutional meaning do not give definitive answers to difficult constitutional questions. Once outside these sources, the general recognition of the situated nature of truth means that decision makers cannot appeal to universally shared understandings to support the chosen constitutional meaning. Moreover, the entry of previously excluded groups as participants in the democratic community, as well as the general diversification of groups represented in American society, means that the community that the Constitution addresses reflects an increasingly wide variety of perspectives on all sorts of issues, including the appropriate principles to inform constitutional meaning.

56. BURTON, supra note 10, at 170-71.
57. Of course, the inability to discern these meanings with certainty is the fatal flaw of formal legitimacy. See, e.g., Posner, supra note 2, at 833 (noting that the success of formal reasoning requires that the major premise be an "unchallenged given").
58. See, e.g., Horowitz, supra note 3 (tracing the origin of the view of constitutional meaning as unchanging).
59. See, e.g., Paul Brest, This Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 230 (1980) ("[T]he interests of black Americans were not adequately represented in the adoption of the Constitution of 1787 or the Fourteenth amendment. Whatever moral consensus the Civil War Amendments embodied was among white male property-holders and not the population as a whole.").
60. See, e.g., ELK, supra note 42, at 2-73 (demonstrating the indeterminacy of a number of theories of constitutional interpretation); Steven L. Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821, 847 (1985) ("[C]onsitutional text is "charitably described as indeterminate"); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 649 (1993) ("[T]he Constitution . . . presents an easy case on which there is widespread agreement [about its indeterminacy]"); see also BORK, supra note 22, at 163 ("The result of the search [for original understanding] is never perfection . . ."). Scalia, supra note 45, at 556 (noting "the difficulty of applying [originalism] correctly").
61. E.g., SUNSTEIN, supra note 14, at 93 ("Reasonable people disagree about what [the Constitution] means.").
62. Since the ratification of the Constitution, African Americans, women, and individuals between the ages of 18 and 21 have received the right to vote. U.S. Const. amend. XV, XIX, XXVI.
The *Casey* plurality indeed hints several times that its decision does not necessarily represent the inevitable derivation of a determinate constitutional meaning from established constitutional principles.\(^63\) Nevertheless, the plurality’s general description of the Court’s decision-making process, as well as the overall authoritarian tone of presentation, contradicts these scattered acknowledgements of the inevitability of value judgments in constitutional adjudication. Under the plurality’s view, a change in constitutional principle “is . . . perceived correctly[] as . . . a statement that a prior decision was wrong” and thus undermines the Court’s legitimacy.\(^64\) Acknowledging the validity of alternate choices of constitutional meaning from the one adopted in the opinion would undermine the opinion’s legitimacy. Instead, these choices must be declared “tempting,” but “inconsistent with our law.”\(^65\) To persuade the public of its legitimacy, a justification for a constitutional decision “must be beyond dispute.”\(^66\)

But dispute is exactly what the formalist mode of presentation engenders. Some of the plurality’s “principled justifications” relate to the force of stare decisis.\(^67\) Others more directly relate to the meaning of the Fourteenth Amendment’s liberty guarantee and the nature of the abortion decision.\(^68\) They all, however, represent value choices that are not dictated uniquely by the traditional sources of constitutional meaning that the plurality cites. This fact, contrasted with the formalist and authoritarian mode of the plurality’s presentation,\(^69\) establishes the fundamental contradiction that undermines the legitimacy of the constitutional meaning that it articulates.

Because of this contradiction, the dissenters can accurately accuse the Justices in the majority of crafting the law according to their own preferences in a way that is not entitled to respect. The plurality’s version of stare decisis is “newly minted;”\(^70\) its “notion of reli-

---

\(^63\) Planned Parenthood v. *Casey*, 112 S. Ct. 2791, 2806 (1992) (plurality) (constitutional interpretation requires the exercise of “reasoned judgment,” which is not mechanical); *id.* at 2808 (“[W]e appreciate the weight of the arguments made on behalf of the State . . . .”).

\(^64\) *id.* at 2815 (plurality).

\(^65\) *id.* at 2805 (plurality) (noting that it is tempting, but incorrect, to adopt a theory of constitutional interpretation that limits the meaning of liberty in the due process clause to “those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution”); *id.* at 2874 (Scalia, J., concurring in part and dissenting in part) (“[T]he Court’s temptation is . . . towards systematically eliminating checks upon its own power; and it succumbs.”); see also BORK, supra note 22, at 1-2 (noting that it is tempting, but incorrect, to adopt a theory of interpretation that allows the Court to expand upon express constitutional provisions).

\(^66\) *Casey*, 112 S. Ct. at 2814 (plurality).

\(^67\) *id.* at 2816 (plurality).

\(^68\) *id.* at 2804-08 (plurality).

\(^69\) See Holmes, supra note 1, at 457-66 (noting this mode of opinion writing); see also Posner, supra note 2, at 865 (same).

\(^70\) *Casey*, 112 S. Ct. at 2855 (Rehnquist, J., dissenting).
ance," "unconventional and unconvincing;" its enunciated standard, "rootless;" and its derivation of its result from that standard, unfaithful to it. As the Chief Justice points out, the Court's concern that it not be perceived to "surrender to political pressure" has "two sides." According to Justice Scalia, the reasons which the Court in Roe and its progeny offer "beg[] the question" by assuming a controversial moral judgment about the status of the fetus that in fact needs a defense. These criticisms, when not merely plausible but true, undermine the core aspects of the Court's legitimacy.

By failing to acknowledge the inevitable value choices in constitutional interpretation, the plurality hides, even from itself, the need at least to attempt to explain them. That is, the plurality deems sufficient the recitation of the formal sources and their chosen meanings. Once it becomes apparent, however, that the chosen meanings are not uniquely correct, as asserted, it also becomes apparent that the plurality has offered no justification for its choice. The choices, quite accurately, appear to be judicial fiat and nothing contradicts the suspicion that they stem from the personal preferences of the decision makers. These recognitions undermine a legitimacy that depends upon the perception that constitutional decision makers are in some significant sense bound by "law." Moreover, by failing to offer any real explanation for its choices, the plurality loses the second aspect of legitimacy, which is respect. After all, an unexplained choice is difficult to respect. It is also difficult to respect decision makers who either do not understand fully or do not want to acknowledge their constitutional interpretative process.

Because of the inconsistency between the plurality's decisional method and its portrayal of it, Justice Scalia accurately can accuse the plurality of "decorat[ing] a value judgment and conceal[ing] a political choice." In fact, recognizing that the Court is making value judgments in constitutional interpretation necessarily changes the ef-

71. Id. at 2862 (Rehnquist, J., dissenting).
72. Id. at 2878 (Scalia, J., dissenting).
73. Id. at 2861 (Rehnquist, J., dissenting).
74. Id. at 2865 (Rehnquist, J., dissenting) (quoting id. at 2815).
75. Id. at 2875 (Scalia, J., dissenting); see also Roe v. Wade, 410 U.S. 113, 159 (1973) ("We need not resolve the difficult question of when life begins.").
76. See Scott Altman, Beyond Candor, 89 MICH. L. REV. 296 (1990) (arguing that the effect of this psychological trick enhances the legitimacy of the judicial decision).
77. See Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 531, 560 (1982). Because of its generality, the concept of equality alone does not answer legal questions, Id. at 551.
78. Sartorius, supra note 13, at 172 ("The very notion of justification, judicial or otherwise, is inseparable from the concept of a good reason for acting in a certain sort of way.").
79. But see Altman, supra note 76, at 328 (arguing that judicial decision making is more legitimate when judges do not fully understand their decision-making process).
fectiveness of a method of justification that portrays the decision as uniquely correct:

As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments[,] . . . then a free and intelligent people's attitude toward us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. . . . [If the Court is making value judgments when interpreting the Constitution], then the people should demonstrate, to protest that we do not implement their values instead of ours.81

The contradiction between the rhetoric and the reality of the constitutional decision-making process thus sets up the Casey plurality for Justice Scalia's attack. Constitutional decision making that involves value judgments is indeed difficult to legitimate according to the traditional understanding that the Court must draw decisions from the constitutional text which differ demonstrably from the Justices' preferences.82 When making value judgments, decision makers will be strongly tempted to mistake their own preferences for the law.83 Should they try to look outside their own preferences, they will find that public views on the values embodied in the Constitution that are worthy of continuing respect inevitably will differ.84 Moreover, even if the public views should reveal some level of consensus, relying upon this consensus as the basis for constitutional meaning may not legitimate the Court's efforts to interpret the enduring, rather than currently popular, constitutional meaning. As Justice Scalia points out, the presentation of a constitutional decision as the inevitable result of the application of established principles exacerbates these problems because it obscures what is really going on, thereby potentially allowing judicial fiat to pass for constitutional law.85

For Justice Scalia and other originalists, the answer to the legitimacy problem lies in the possibility of returning to a constitutional

81. Id. at 2884-85 (Scalia, J., dissenting).
82. See, e.g., Bork, supra note 22, at 265 ("[T]he original understanding of the Constitution is the exclusive source" for principles of constitutional interpretation "that are independent of the judge's preferences.").
83. Scalia, supra note 45, at 863.
84. ALASDAIR MACINTYRE, AFTER VIRTUE 6-11 (2d ed. 1984) (detailing how perspectives on basic moral questions are incommensurable).
85. See Casey, 112 S. Ct. at 2874 (Scalia, J., dissenting) ("[T]he Court does not wish to be fettered by any . . . limitations on its preferences.").
interpretive process that involves merely “ascertaining an objective law.” 86 Although “value judgments” should not be “dictated,” 87 the Court legitimately can impose analysis of “texts and traditions,” because this method of interpretation appropriately constrains the Justices’ ability to enact their own preferences into law. 88 Missing from this analysis, however, is a foundational justification for relying upon the originalist sources of meaning in the first place. This omission is a value judgment. 89 Thus Justice Scalia, too, makes a political choice and, with his rhetoric, conceals it. 90

But, in explaining a legitimate decision-making process, the plurality perpetuates the illusion of formal legitimacy and thereby strengthens the originalist critique by paralleling its assumptions. Specifically, by implying that the sources it cites are foundational, the plurality structures the debate in originalist terms. The question becomes which opinion is most true to the meaning of the presumptively authoritative and determinate sources. In this type of debate, originalists often will win. Original meaning, according to the particular theory, 91 often, although not always, is quite discoverable and determinate. 92 Moreover, originalists can claim quite accurately to be better able to preclude individual decision makers from relying upon personal preferences than can interpretive theorists who do not establish a hierarchy of particular sources of constitutional meaning. 93 This debate, however, fails to address the initial decision to rely upon an originalist interpretive method. This value judgment is as controver-

86. Id. at 2884 (Scalia, J., dissenting).
87. Id. at 2885 (Scalia, J., dissenting).
88. Bork, supra note 12, at 1-11; Scalia, supra note 45, at 864.
90. Michael J. Gerhardt, A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia, 74 B.U. L. REV. 25, 27 (1994) (demonstrating that Justice Scalia “relied on something outside the constitutional text to interpret it . . . [which are] political and personal judgments regarding the proper role of the judiciary”).
92. See Kay, supra note 89, at 236-59; Earl M. Maltz, The Failure of Attacks on Constitutional Originalism, 4 CONST. COMMENTARY 43, 50-52 (1987); Perry, supra note 91, at 686 (“The serious question is not whether the originalist conception can inform the practice of judicial review—it can—but whether it should inform the practice.”). But see H. Jefferson Powell, The Original Understanding of Original Intent, 98 HARV. L. REV. 885 (1985) (questioning whether, even if it is findable and determinant, the framers intended original intent to control constitutional interpretation).
93. See Scalia, supra note 45, at 864 (“Originalism does not aggravate the principal weakness of the system [which is the inevitable tendency of judges to think that the law is what they would like it to be], for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself.”).
sial as the value judgments which the Court makes when engaged in nonoriginalist interpretation. But a method of portraying the constitutional decision-making process that assumes the foundational authority of these sources obscures the need to justify them.

If the decision in *Casey* were the only example of the contradiction between the rhetoric of the Court’s opinions and its necessary decision-making process, the prediction of a growing threat to its interpretive legitimacy might be premature. *Casey* is not, however, an anomaly in this respect. Instead, the contradiction pervades and threatens the legitimacy of the Court’s entire constitutional jurisprudence—the more controversial the case, the more obvious the contradiction and, thus, the more acute the threat to the Court’s legitimacy. I will briefly discuss another recent example.

Perhaps no area of the Court’s constitutional jurisprudence is in greater disarray than its interpretation of the Religion Clauses. Within this broad category, its decisions regarding public sponsorship of religious displays are particularly controversial. The Court’s most recent decision in this area, *County of Allegheny v. ACLU*, exhibits the contradiction between formalist assumptions in presentation and the inevitable value judgments in the decisional process.

The issue in *County of Allegheny* concerned two holiday displays, one including a creche and the other including a menorah. The creche was surrounded by poinsettias and was located on the grand staircase of the Allegheny County Courthouse in downtown Pittsburgh. The menorah was located outside the city-county building, also in downtown Pittsburgh, along with a Christmas tree and a sign saluting liberty. The ACLU alleged that both displays violated the First Amendment Establishment Clause. In opinions widely criticized as incoherent, various combinations of Justices held the creche display unconstitutional and the menorah display constitutional.

In resolving the issues presented in *County of Allegheny*, all of the Justices start from the premise that the Establishment Clause guarantees religious liberty. They also agree that the government safeguards religious liberty by being “neutral” toward religious be-

---

94. *See* SUNSTEIN, supra note 14, at 101 (“Acceptance of [the] view [that the original understanding is binding] itself rests on a controversial moral foundation.”).

95. I use these two areas of the Court’s jurisprudence as examples only. Other areas suffer from the same legitimacy problem. *See*, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 111 (2d ed. 1988) (“The aspect of the Court’s standing jurisprudence most open to criticism ... is less the underlying view of the role of the judicial council this new jurisprudence embodies, than the Court’s lack of candor in articulating and justifying the basic choice it has made.”).


97. *See* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion ...”).

98. 492 U.S. at 590; id. at 631 (O’Connor, J., concurring); id. at 652 n.11 (Stevens, J., concurring in part and dissenting in part); id. at 660 (Kennedy, J., concurring in part and dissenting in part).
The Justices disagree, however, as to how the government achieves the constitutionally required neutrality in the context of the displays of religious symbols on government property. The Court has been struggling for quite a while to identify an alternative to the traditional Lemon v. Kurtzman three-part test for determining an Establishment Clause violation. County of Allegheny considers only one prong of the test, whether the “principal or primary effect” of the holiday displays was “one that neither advance[d] nor inhibit[ed] religion.” The Justices in the majority and the dissent adopt two different standards to determine whether the displays had this unconstitutional effect.

The majority of Justices apply an endorsement test requiring that the government not endorse, i.e., “favor,” “prefer,” or “promote” religious beliefs. This test “captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to his or her standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’” According to the majority, the endorsement test is consistent with previous Court decisions, although those decisions mention it only erratically. The test also follows from the “history and tradition of religious diversity . . . that is our national heritage.” Although the test is consistent with the historical meaning of the Establishment Clause, government practices at the time of its creation do not conclusively determine its modern meaning. The words of the Establishment Clause must be interpreted according to their recognized meaning “today,” not as they

99. Id. at 590-94; id. at 627 (O'Connor, J., concurring); id. at 644 (Brennan, J., concurring in part and dissenting in part); id. at 655-59, 664, 675-76 (Kennedy, J., concurring in part and dissenting in part).

100. See infra notes 103-20 and accompanying text.

101. 403 U.S. 602 (1971). A government action that arguably aids religion does not violate the Establishment Clause so long as it: (1) has a secular purpose; (2) has a principal or primary effect that does not advance or inhibit religion; and (3) does not give rise to an excessive entanglement between government and religion. Id. at 612-13; see, e.g., Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (not relying on the Lemon test); id. at 2495 (O'Connor, J., concurring) (suggesting alternatives to the Lemon test); id. at 2505 (Scalia, J., dissenting) (criticizing the Lemon test).

102. County of Allegheny, 492 U.S. at 592; Lemon, 403 U.S. at 612.

103. County of Allegheny, 492 U.S. at 593.

104. Id. at 627 (O'Connor, J., concurring).

105. Id. at 591-97; id. at 623-28 (O'Connor, J., concurring).


107. County of Allegheny, 492 U.S. at 589; see also id. at 646-50 (Stevens, J., concurring in part and dissenting in part) (arguing that the history of the Establishment Clause supports “a strong presumption against the display of religious symbols on public property”).

108. Id. at 590, 603, 605 & n.55; id. at 630 (O'Connor, J., concurring); id. at 649 (Stevens, J., concurring in part and dissenting in part).
may have been understood "in the early days of the Republic." Thus, "historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause."

Rather than using the majority's endorsement test, Justice Kennedy, joined by three other Justices, would invalidate government actions only if they "coerce[d] anyone to support or participate in any religion or its exercise." Under this test, the government coerces religious belief when it "in the form of taxation . . . supplies the substantial benefits that would sustain a state-established faith, directly compels observance, or . . . exhorts to religiosity [in a way] that amounts in fact to proselytizing." In particular, "symbolic recognition . . . of religious faith" by the government only violates the Establishment Clause if it "benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." According to Justice Kennedy, this coercion test, rather than the endorsement test, is consistent with previous Court decisions, although certain statements in prior decisions suggesting otherwise should not be read with "formalism" or "[t]aken to [their] logical extreme." This test is also consistent with the Establishment Clause's "ultimate constitutional objective as illuminated by history." Yet history, viewed strictly as government practices generally accepted at the time that the First Amendment was ratified, is not binding. Rather, the meaning of the Establishment Clause must be interpreted in light of the relationship between the government and the people "in this century." Consequently, the modern coercion test permits government practices, such as "displays commemorating religious holidays," even though they were not commonplace in 1791 if they "have no greater potential for an establishment of religion" than "practices two centuries old."

109. Id. at 590.
110. Id. at 630 (O'Connor, J., concurring).
111. These are Chief Justice Rehnquist, Justice White, and Justice Scalia.
112. 492 U.S. at 659 (Kennedy, J., concurring in part and dissenting in part).
113. Id. at 659-60 (Kennedy, J., concurring in part and dissenting in part).
114. Id. at 661-63 (Kennedy, J., concurring in part and dissenting in part).
115. Id. at 666-68 (Kennedy, J., concurring in part and dissenting in part) (referring to Lynch v. Donnelly, 465 U.S. 668 (1984), and Marsh v. Chambers, 463 U.S. 783 (1983)).
116. Id. at 657 (Kennedy, J., concurring in part and dissenting in part).
117. Id. (Kennedy, J., concurring in part and dissenting in part) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 670-71 (1970)).
118. Id. at 669 (Kennedy, J., concurring in part and dissenting in part) ("[T]he relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding.").
119. Id. at 657 (Kennedy, J., concurring in part and dissenting in part).
120. Id. at 669-70 (Kennedy, J., concurring in part and dissenting in part).
The proponents of both the endorsement and coercion tests thus offer principled justifications. Both sides appeal to history and precedent to support their preferred tests. Yet, in interpreting the history, both sides acknowledge that practices at the time that the religion clauses were created do not bind current constitutional meaning. Rather, the Justices must choose the relevant historical practices and determine their significance as to the modern meaning of religious liberty. The same precedent, of course, is cited by one side and distinguished by the other. The County of Allegheny decision thus reveals the task of defining the “neutrality” demanded by the Establishment Clause to be the nonneutral one of giving meaning to an indeterminate text.

The substance of the justifications offered by the various opinions therefore makes obvious that the choice of constitutional meaning depends upon value judgments, about which perspectives will differ. Although the Justices at several points acknowledge that they must “choose” a test to determine constitutional meaning, their portrayal in their opinions of their decision-making processes and results is rigidly formalistic. Both Justices Blackmun and Kennedy base their conclusions on “settled law.”

According to Justice Blackmun, Justice Kennedy’s view represents “a failure to recognize [a] bedrock Establishment Clause principle,” and “transparently lacks a principled basis, consistent with ... precedent[].” Justice Kennedy’s claim that the majority’s interpretation of the Establishment Clause evidences a “callous indifference” to the role of religion in public life is “[f]ar from the truth,” “offensive,” and “absurd.” In fact, “[n]o misperception could be

121. Id. at 589-90; id. at 630-31 (O’Connor, J., concurring); id. at 646-49 (Stevens, J., concurring in part and dissenting in part); id. at 655-59, 669 (Kennedy, J., concurring in part and dissenting in part).
122. Id. at 591-97; id. at 623-28 (O’Connor, J., concurring); id. at 655-58, 668-89 (Kennedy, J., concurring in part and dissenting in part).
123. Id. at 590, 603, 605 & n.55; id. at 630 (O’Connor, J., concurring); id. at 649 (Stevens, J., concurring in part and dissenting in part); id. at 669 (Kennedy, J., concurring in part and dissenting in part).
124. Id. at 630 (O’Connor, J., concurring) (noting that the long-standing existence of practices may make it less likely that the practices convey an endorsement of religion, but also noting that “historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause.”); id. at 671 & n.8 (Kennedy, J., concurring in part and dissenting in part) (listing presidential Thanksgiving Day proclamations as evidence of a relevant tradition, but noting that Thomas Jefferson declined to follow this tradition due to his strict views of the degree of separation mandated by the Establishment Clause).
125. Id. at 662 (Kennedy, J., concurring in part and dissenting in part) (relying on Lynch and Marsh); id. at 602-03 (Blackmun, J., distinguishing them).
126. Id. at 609; id. at 670 (Kennedy, J., concurring in part and dissenting in part).
127. Id. at 590; id. at 669 (Kennedy, J., concurring in part and dissenting in part).
128. Id. at 605.
129. Id. at 610 n.57.
130. Id. at 610.
more antithetical to the values embodied in the Establishment Clause."\textsuperscript{131} Rather, it is "incontrovertible that the Court's decision . . . represent[s] . . . the respect for religious diversity that the Constitution requires."\textsuperscript{132}

Similarly, Justice Kennedy finds the majority's reasoning "quite confusing,"\textsuperscript{133} and marvels at "the depth of its error."\textsuperscript{134} Its adoption of the endorsement test is "troubling," and its result, "bizarre."\textsuperscript{135} The majority "disregard[s] precedent and historical fact,"\textsuperscript{136} and "lends its assistance to an Orwellian rewriting of history."\textsuperscript{137} Its approach "contradicts important values embodied in the [Establishment] Clause."\textsuperscript{138} The view consistent "with our history and our precedents"\textsuperscript{139} is that the decisions of a local government to permit the holiday displays at issue represent "matters of taste" over which the "written Constitution" gives the Court "no jurisdiction."\textsuperscript{140}

Justice Scalia does not participate in the decision in \textit{County of Allegheny} and, therefore, is not available to provide caustic commentary detailing the inconsistency between the formalist rhetoric of the opinions and the value judgments upon which the constitutional meanings necessarily rely.\textsuperscript{141} Nevertheless, the many opinions in \textit{County of Allegheny} reveal, without the need for explicit commentary, that principled justification can be offered in support of a number of different constitutional meanings. This recognition dissipates the justificatory power of the rhetoric. As in \textit{Casey}, once it becomes clear that the decision making in fact involves value judgments that the Court cannot justify solely by reference to the text and precedent, then efforts to do so appear naive or duplicitous. Because the formal justification starts after the Court has made its value choices, the reasons it offers do not explain the choices in a way that could possibly legitimate them.\textsuperscript{142} The opinions devolve to a shouting match, and efforts to offer a "principled justification" for the constitutional interpretation start

\begin{itemize}
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Id. at 613.
  \item \textsuperscript{133} Id. at 668 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{134} Id. at 668 n.6 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{135} Id. at 669 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{136} Id. at 674 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{137} Id. at 678 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{138} Id. at 677 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{139} Id. at 655 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{140} Id. at 679 (Kennedy, J., concurring in part and dissenting in part).
  \item \textsuperscript{141} Such commentary from other Establishment Clause decisions in which Justice Scalia dissented helps fill the gap. See, e.g., Board of Educ. v. Grumet, 114 S. Ct. 2481, 2506 (1994) (Scalia, J., dissenting) ("Once this Court has abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion.");
  \item \textsuperscript{142} See David Lyons, \textit{Justification and Judicial Responsibility}, 72 CAL. L. REV. 178, 182 (1984) ("Th[e] availability of [reasonable, respectable] legal arguments on both sides [of hard cases] means that the relevant point of law can be decided, if at all, only by nondeductive arguments which take conflicting considerations into account.").
\end{itemize}
to look exactly like what they cannot legitimately be—naked exercises of judicial power and impositions of judicial preferences.\textsuperscript{143}

In sum, the Court's continued adherence to formalism in the presentation of its constitutional decisions subverts the legitimacy that it tries to maintain. The Court appears disingenuous or naive by claiming not to do what it obviously must. Justice Scalia, an eloquent spokesperson for an originalist interpretive method who quite accurately identifies and criticizes the Court's inconsistencies, aids in this appearance. Perhaps most important, by failing to acknowledge its value choices, the Court also has failed to begin the work of trying to justify sources of meaning as other than undisputedly authoritative. In a nation "dedicated to the rule of law,"\textsuperscript{144} but without such foundational sources of meaning, the time to begin the work of defining and following the path of an alternate legitimacy has arrived.

III. COMPONENTS OF A NEW LEGITIMACY

If, as I argue, the crux of the Court's legitimacy problem stems from the widening chasm between what it claims it is doing in interpreting the Constitution and what it realistically can be doing, then the cure would appear to be to close the gap by harmonizing the Court's manner of presenting its decisions with its actual decision-making process. Specifically, the Court could acknowledge the value choices that it makes and explain the actual underlying reasons.\textsuperscript{145}

Why doesn't the Court do this? I suspect the Court has several reasons for its continued adherence to what I view as an outdated and counterproductive mode of presenting its decisions. One reason is simple force of habit. Changing a method of presentation that has become ingrained in the very idea of what a judicial opinion should be is indeed difficult. A second reason supports the force-of-habit explanation with the if-it's-not-broken-don't-fix-it rationale. My purpose in Part II was to demonstrate that the formal mode of presentation is defective, and that its inadequacies are becoming increasingly obvious.

\textsuperscript{143} Others have noted that legal language of objectivity and neutrality can disguise what is actually a naked imposition of preferences that are not universal. For critical legal scholars making this point, see, e.g., Kennedy, \textit{supra} note 13, at 1731-37; Tushnet, \textit{supra} note 36, at 804-24; Unger, \textit{supra} note 13, at 655-60. For feminist legal theorists, see, e.g., Katherine T. Bartlett, \textit{Feminist Legal Methods}, 103 HARV. L. REV. 829, 877 (1990); Lucinda M. Finley, \textit{Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning}, \textit{64 Notre Dame L. Rev.} 886 (1989); Martha Minow, \textit{Justice Engendered}, 101 HARV. L. REV. 10, 38-45. For critical race theorists, see, e.g., Derrick Bell & Preeta Bansal, \textit{The Republican Revival and Racial Politics}, \textit{97 Yale L.J.} 1609, 1611 (1988); Richard Delgado, \textit{The Inward Turn in Outsider Jurisprudence}, \textit{34 Wm. & Mary L. Rev.} 741, 748 (1993).

\textsuperscript{144} Planned Parenthood v. Casey, 112 S. Ct. 2791, 2814 (1992) (plurality).

To me, the shrill tones of the Court’s most controversial constitutional decisions indicate that the Justices themselves are aware of this growing problem. In fact, I suspect that the Court’s continued adherence to a formal mode of presentation stems not so much from the perceived efficacy of the presentation as from the failure to perceive alternate manners of presentation that could create the perception of legitimacy. That is, if the only alternative to formal legitimacy is the abyss of relativism, it may be better to perpetuate the illusion of formal legitimacy for as long as possible.  

Like the Court, I am not sure an alternative to formal legitimacy exists. I am more sure, however, that formal legitimacy does not work. It is on that commitment, therefore, that I believe it appropriate to act. We need to define a legitimacy that does not depend upon indisputable foundational sources of constitutional meaning. The Court can play a role in doing this. In this Part, I offer components of a revised understanding of legitimacy, which, if displayed in a judicial opinion, could help demonstrate the crucial components of legitimacy—that the decision reflects law rather than the personal preferences of the decision makers, and that the content of that law is worthy of public respect.

A. Principled Decision Making

"[P]rincipled justification," according to the Court, is the essence of the "judicial act." A "principled decision" is "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Thus, principles are a particular type of reason that have been, and continue to be, viewed as crucial to establishing the legitimacy of the Court’s constitutional interpretations.  

I will offer here the classic understanding—apparent, I believe, in the Court’s opinions—of how reliance upon principles in constitutional
interpretation establishes the core elements of its legitimacy. Most fundamentally, principles constrain the judicial decision so that the decision maker does not act as "a naked power organ." The discipline of locating and relying upon principles removes personal bias as much as possible from the decision-making process. It also helps decision makers screen out other extraneous influences that may dictate particular results but may not be consonant with enduring principles. Articulated principles help harmonize decisions with each other. This harmony lends coherence and predictability to the law. These traits, in turn, help demonstrate the enduring, rather than the case specific, nature of the grounding of constitutional decisions. In addition, the requirement that the decision maker provide such an articulation actually may change the process, as the decision maker may discover that a certain desired result "simply won't write." The exercise of providing reasons thus may serve as an important constraint on the decision-making process.

Principles support not only the substance but also the perception of legitimacy. By stating the principles upon which it relied, the decision maker demonstrates the substance. The content of the principles offered should engender respect. Moreover, the very act of providing them may engender respect as well by treating the losing litigants and the public at large as deserving of an explanation. Finally, the act of stating principles in judicial opinions facilitates communication among constitutional decision makers. The apparent continuity of these principles can demonstrate an accumulated wis-

151. Wechsler, supra note 12, at 12.
153. In addition to purely personal preferences, judges may be influenced by interest groups, the values of their social or economic class, see BORK, supra note 22, at 8; ELY, supra note 42, at 56-59; or perhaps by the impulse to bend over backwards so as not to act upon their personal preferences.
154. Greenawalt, supra note 152, at 998.
155. See, e.g., id. at 1000; Steven D. Smith, Idolatry in Constitutional Interpretation, 79 VA. L. REV. 583, 619 (1993) ("[P]rinciples function to endow constitutional provisions with a wisdom that transcends that of either their flesh-and-blood authors or their mortal interpreters."); Wechsler, supra note 12, at 12 (criticizing "ad hoc evaluation").
156. Frank M. Coffin, The Ways of a Judge 57 (1980) ("The act of writing tells us what was wrong with the act of thinking."); see J. Clark Kelso, A Report on the California Appellate System, 45 HASTINGS L. J. 433, 457 (1994) ("[W]riting an opinion . . . helps to ensure the . . . initial decision withstands the disciplined rigor of a written memorialization.").
157. Golding, supra note 47, at 9 ("[R]easons . . . operate as controls on the process of deliberation.").
159. Golding, supra note 47, at 9 ("The reasons [which the Court offers in an opinion] will have to be regarded by [the audience] as good reasons for the decision.").
160. Id. at 8 ("In making an effort at rational persuasion, judges show respect for their audience by addressing its members as rational individuals . . . .").
161. Greenawalt, supra note 152, at 998 ("[T]he technique of posing cases and suggesting principles orally and in draft opinions is a crucial method of communication among judges . . . .").
domain, which in turn helps to show that the decision is independent of purely personal preferences and worthy of respect.

Pursuant to this understanding, "[t]he virtue or demerit of a judgment turns... entirely on the reasons that support it and their adequacy to maintain any choice of values it decrees..."162 The problem, however, with the use of such "neutral principles" as the sole determinant of constitutional interpretive legitimacy is that the neutrality upon which the validity of the principles depends is impossible to achieve.163 That is, principles do not dictate value choices. The actuality is vice versa.164 Thus "principles" cannot serve the ultimate justificatory function as traditionally envisioned.165

The question is whether principles can still serve some important function with respect to creating legitimacy even if they alone are not sufficient to sustain it. I think they can.166 That principles cannot provide ultimate justification does not mean that they can provide none at all.167 A new understanding of legitimacy must be based upon real possibilities. Achieving some of the qualities that principles have been thought to provide is better than achieving none. That reliance upon principles to establish interpretive legitimacy may require supplementation does not mean that constitutional decision makers should abandon them altogether.

One way in which the effort to rely on principles can still help constitutional decision makers is by screening out personal and other partisan biases. The discipline of finding and enunciating principles that transcend particular cases can make at least some constitutional meanings wildly implausible.168

Thinking in terms of principles also can help decision makers to remember the goal of articulating constitutional meanings that not only stem from the past, but also will endure into the future. In turn,

163. See, e.g., Tushnet, supra note 36, at 822 ("Neutral principles theory proves unable to satisfy its demand for rule-guided judicial decisionmaking in a way that can constrain or define the judicial institution...").
164. See, e.g., Sunstein, supra note 14, at 103 ("Those who deny the existence of [moral decisions external to the Constitution] are without self-consciousness."); see also Taylor, supra note 21, at 99 ("It is a form of self-deception to think that we do not speak from a moral orientation which we take to be right.").
165. See Levinson, supra note 5, at 401 (Such justification requires an "antecedent morality," which supplies a "common vocabulary in terms of which critics can argue with one another about how well this task [of constitutional interpretation] has been performed.") (quoting Richard Rorty, Nineteenth-Century Idealism and Twentieth-Century Textualism, in Consequences of Pragmatism 139 (1982)).
166. I am not alone in this belief. See Greenawalt, supra note 152, at 1001 ("I do not believe any critic denies that at least one thing for which courts should strive is principled justification...").
167. See, e.g., Jules L. Coleman & Brian Letter, Determinancy, Objectivity and Authority, 142 U. PA. L. REV. 549, 589 (1993) ("Uniqueness... is not a requirement of legitimate authority.").
168. See, e.g., Schauer, Easy Cases, supra note 13.
displaying the principles in the judicial opinion can move toward establishing that the constitutional decision-making process is substantively legitimate. And, most basically, the act of trying to articulate principles for constitutional decision making is more likely to engender respect than unexplained pronouncement. 169

Finally, we have, after all, grown accustomed to principled decision making as the mark of constitutional interpretive legitimacy. Even if principles are largely indeterminant, their invocation still seems to command some respect, which is an aspect of legitimacy. I say, let principles continue to work what magic they can. 170 At the same time, we should begin constructing a foundation under the invocation of principles, so that when they become obviously empty of justificatory power, something else supports the decision's legitimacy. In the remaining subparts, I discuss additional components of legitimacy that can supplement the invocation of principles.

B. Articulacy

A demonstrated reliance upon principles, as I have argued, can help establish the core elements of interpretive legitimacy both because these principles help constrain constitutional decision makers from writing their own preferences into the law and because they can engender public respect. Using principles in establishing constitutional interpretive legitimacy is of limited value, however, because they are often so general that they support a number of different constitutional meanings 171 and thus may not truly explain the meaning that the Court has chosen. Although the Court in its explanations purports to use broad principles to derive specific meanings, the reality is vice versa: the broad principles which the Court articulates already contain choices about more specific meanings that the Court fails to justify. Absent an explanation that addresses the controversial choices made by the Court, its chosen constitutional meanings appear to be judicial fiat. 172 This appearance undercuts the Court's interpretive legitimacy. What is necessary, therefore, is an explanation that precedes principles and that can help demonstrate that the chosen constitutional meaning differs from the decision makers' personal preferences and, thus, is worthy of respect.

169. See, e.g., Sunstein, supra note 14, at 126 ("[A]ny position about law and politics, to be worth holding, must be justified with reference to reasons.").
170. See Smith, supra note 155, at 619-25 (describing the invocation of principles as a step in constitutional idolatry).
171. See, e.g., Schauer, Formalism, supra note 13, at 514; Tushnet, supra note 36, at 822 (When following a "principle . . . we can justify a tremendous range of divergent answers by constructing the rule so that it generates the answer that we want.").
172. See, e.g., Feldman, supra note 36, at 704 (noting the problem where "Justices inevitably seem to impose their personal values on society").
This phenomenon of unarticulated understandings in constitutional adjudication represents, I believe, a more specific instance of the dilemma, apparent in public discussions generally, that people hold different moral commitments which they deem to be fundamental and from which they reason to judgments on particular issues. These different underlying premises lead to different specific results. Our problem is that we have not found a way to mediate meaningfully among the basic premises. Absent some sort of judgment and a justification for that judgment at the most basic level of discussion, justifications offered further up the chain of logic are unconvincing.

Take, for example, the raging public debate over whether the law should permit abortion. Views on this issue generally stem from judgments about the relative value of fetal life and a woman's bodily autonomy. These judgments may have religious, philosophical, pragmatic, or other roots. Adherence to these judgments, however, is not a matter of logic, but a matter of faith or emotional embrace. Logic cannot mediate among these rival premises. Hence, efforts at justification that define these nonlogical judgments as their starting points begin their reasoning after points of view have already diverged. When the discussions begin at this level, rational reconciliation of the competing positions seems only a faint possibility.

The Court's discussions of the constitutional protection of the abortion decision suffer the same fate. "At the heart [of the liberty protected by the Fourteenth Amendment]," explains the Casey joint opinion, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." This premise competes with the premise "that what the Court calls the fetus and what others call the unborn child is a human life." For those who subscribe to the latter premise, the constitutional meaning derived by logical reasoning from the former "is bound to be wrong." Thus, those who do not agree with the former premise will remain unconvinced by a judicial opinion based upon it.

These rival, and apparently incommensurable, premises that guide judicial and public argumentation are not, however, without

173. See, e.g., MACINTYRE, supra note 84, at 253 ("[M]odern politics cannot be a matter of genuine moral consensus."); Levinson, supra note 5, at 401 (disputing the view that "morality remains widely shared and available to reflection").


175. See MACINTYRE, supra note 84, at 6-11 (detailing rival positions on the morality of abortion and noting the incommensurability of their underlying premises).


177. Id. at 2875 (Scalia, J., dissenting).

178. Id. (Scalia, J., dissenting).

179. See MACINTYRE, supra note 84, at 8 (defining incommensurability as existing when "the rival premises are such that we possess no rational way of weighing the claims of one as
foundation. The Court has moved away from reliance upon founda-
tional sources of meaning because some more contingent sources of
meaning guide them. Indeed, such contingent sources of meaning in-
form the competing premises from which adherents to different points
of view on abortion reason. These sources are difficult, but not impos-
sible, to identify.\textsuperscript{180} Nor do these premises stand alone. Rather, each
is connected to a moral vision that, in fact, establishes the existence of
the premises. The premises themselves make sense only in light of this
moral vision. That is, the moral vision more specifically explains the
meaning of the premise and why the premise is worth affirming.\textsuperscript{181}
The vision thereby helps justify conclusions to which the premise
leads. This type of articulacy about the sources and moral visions in-
forming constitutional decisions is the Court’s best hope of justifying
its authority when the principles upon which it ostensibly relies are
hotly disputed.

I adapt my meaning of articulacy in constitutional interpretation
from Charles Taylor’s recent philosophical discussion.\textsuperscript{182} Articulacy
means putting the vision of the good that informs the particular judg-
ment into words.\textsuperscript{183} Such articulacy is necessary for the judgment to
convey its meaning because “the good is what, in its articulation, gives
the point of the rules which define the right.”\textsuperscript{184} That is, we all “speak
from a moral orientation which we take to be right.”\textsuperscript{185} We, by and
large, assume, however, the grounding for this moral orientation
rather than state it directly. But, without articulating the sources of
these moral orientations, we cannot examine, discuss or even affirm
them. Thus, moral disagreements are in fact intractable because no
discussion occurs at the point where the moral commitments diverge.
Articulacy represents “the attempt to articulate the good” that in-
forms the moral principles that, in turn, lead to judgments on particu-
lar issues.\textsuperscript{186}

\textsuperscript{180.} See, e.g., MACINTYRE, supra note 84, at 6-11 (tracing various positions on the mor-
ality of abortion to ideas articulated by various philosophers).

\textsuperscript{181.} See TAYLOR, supra note 21, at 77. Taylor explains:
It is one thing to say that I ought to refrain from manipulating your emotions or threatening
you, because that is what respecting your rights as a human being requires. It is quite an-
other to set out just what makes human beings worthy of commanding our respect, and to
describe the higher mode of life and feeling which is involved in recognizing this.

\textsuperscript{182.} See TAYLOR, supra note 21, at 53-107 (discussing the “ethics of inarticulacy” and
“the point of articulacy about the good”).

\textsuperscript{183.} Id. at 103 (arguing for “the attempt to articulate the good in some kind of philosophi-
cal prose”).

\textsuperscript{184.} Id. at 89.

\textsuperscript{185.} Id. at 99.

\textsuperscript{186.} Id. at 103.
Specifically, "articulating a vision of the good" differs from "offering a basic reason" because reasons already contain assumptions about the good. Thus, discussions that start with reasons actually may begin after perspectives have diverged. Articulacy about "what underlies our ethical choices, leanings, intuitions" addresses the point of the divergence. It requires "setting out just what I have a dim grasp of when I see that A is right, or X is wrong, or Y is valuable and worth preserving, and the like. It is to articulate the moral point of our actions." Only at this level does the articulation have the possibility of being convincing, "either by articulating what underlies [the listener's] existing moral intuitions or perhaps by [the] description moving [the listener] to the point of making it [the listener's] own."

Once we recognize that constitutional adjudication requires value judgments, I think that we need to see that this type of decision making, like moral decision making generally, stems from a vision of the good. The threat to the legitimacy of constitutional interpretation thus stems from confusion similar to that which Taylor identifies as plaguing modern philosophy, that proponents of rival interpretations keep their "most basic insights inarticulate." This "inarticulacy" is a "crippling handicap to seeing clearly . . . in the very modern predicament of perplexity and conflict between rival notions of the good." The Court's continued adherence to formalist assumptions in its portrayal of its constitutional decision-making process feeds this confusion.

Only an effort at articulacy can rescue the Court from its predicament. This requires an effort to identify, explain, and justify as appropriate the sources of value judgments that inform the Court's constitutional decisions and the visions of the good to which they lead. In Casey, for example, greater articulacy would require a discussion of why the joint opinion reaffirms a constitutional meaning that protects the right to terminate a pregnancy. In so doing, the joint opinion privileges a woman's autonomy over fetal life during the first part of a pregnancy. This judgment stems, in part, from a vision of the good

187. Id. at 77.
188. Id. Assumptions about the good "function as an orienting sense of what is important, valuable, or commanding which emerges in our particular intuitions about how we should act, feel, respond on different occasions, and on which we draw when we deliberate about ethical matters." Id.
189. Id.
190. Id.
191. Taylor claims that articulacy about the good "isn't a step to a more basic level, because there is no asymmetry." Id. I use this terminology, however, because I find it most descriptive of what needs to be done—articulate what comes before the articulation of a reason.
192. Id.
193. Id. at 89.
194. Id. at 98.
that requires this right. The Court needs to explain the value of providing this right. References to "liberty" and "bodily integrity" are not enough, as competing visions of these concepts are at stake. The Court needs to provide a vision of the good that explains its decision to narrow those terms in a particular way.

This effort at articulacy, I believe, can address the primary component of the threat to the Court's interpretive legitimacy, which is that controversial value judgments remain unacknowledged, unexplained and, thus, unconvincing. Of course, nothing guarantees that such articulacy about sources of values and visions of the good that lead to constitutional decisions ultimately will be convincing. Certainly it is unlikely to convince all listeners. The same, however, is true of the current method of making and presenting judicial decisions—some people remain unconvinced. In very controversial cases in which mere pronouncements of values have become unconvincing, a deeper explanation of the source of the values at least creates the possibility of convincing those with apparently different perspectives on constitutional meaning. At a minimum, articulacy makes the visions of the good upon which the constitutional meanings depend available for affirmation or persuasion. I think it quite likely that this increased lucidity can lead to some degree of reconciliation of apparently incommensurable perspectives. This reconciliation, in turn, could add legitimacy to the constitutional decision.

In addition, greater articulacy can enhance the legitimacy of the judgment, even as to those who remain unconvinced. Most basically, articulacy grants the legitimacy that comes from honesty, which is the legitimacy that comes from treating people with respect. Because articulacy represents not only honesty, but also effort, it could lend the additional legitimacy of respect that comes from observing a diligent effort to work through a perplexing dilemma. Moreover, articulacy, which requires a fuller explanation of value judgments, creates a greater possibility of explaining convincingly how the chosen values differ from the decision maker's personal preferences. This type of explanation, too, may help legitimate the decision even for those who disagree with the result. Also, articulacy about the vision of the good that motivates the decision exposes this vision to ongoing critical review, thereby allowing those who disagree with the decision maker's

195. See id. at 77.
196. Like Taylor, I can offer this only as a "hunch." Id. at 106.
197. See the discussion of the legitimacy that comes from converged perspectives infra part III.C.
198. See Shapiro, supra note 145, at 736.
199. See Golding, supra note 47, at 8 (explaining that the reasons that underlie a decision may legitimate it for those who disagree by demonstrating that the decision "was not made arbitrarily").
articulation of those grounds to question them in the course of interpreting constitutional meaning. Articulacy’s implicit assurance that this type of discussion can continue to occur may add to the legitimacy of the current result.

Like the exercise of finding and stating principles for constitutional decision making, articulacy alone cannot legitimize the Court’s authority. In tandem, however, with the giving of principles, articulacy can enhance the legitimacy of constitutional decision making. Articulacy creates the possibility of explaining, and thereby potentially legitimating, what, despite the exercise of offering principles, most often now goes unacknowledged and thus unexplained.

C. Augmenting Perspectives

Articulacy supplements the act of giving principles for constitutional decision making by adding depth to the explanation. It thus creates a greater possibility of explaining a constitutional decision in a way that appears independent of the decision maker’s personal preferences and worthy of respect. But articulacy is not enough to demonstrate the legitimacy of a constitutional decision because, as I have described it thus far, articulacy requires only explanation of the choice that the Court makes. Although mere explanation of the Court’s choice provides some legitimacy, the mere description lacks substantive legitimacy. A more complete legitimacy must thus contain another component which can help guide the Court toward choices that are more likely to be something other than the decision maker’s preferences and, because of this fact, worthy of public respect.

This additional component of legitimacy is the demonstrated interpersonal validity of the judgment that comes from augmenting perspectives in the decision-making process. I derive this additional component from the aspiration that formal legitimacy cannot achieve—a universally acknowledged foundation to underlie judicial reasoning. Of course, universally affirmed guides for decision making are not available. Nevertheless, as with the other components of legitimacy that I have discussed, I do not see why the inability to achieve legitimacy entirely through this vehicle dictates abandoning altogether the legitimacy that comes from shared recognitions. Although the as-

200. Articulacy thus builds elements of the deconstructive method into the decision-making process itself. See DRUCILLA CORNELL, BEYOND ACCOMMODATION (1991) (suggesting this same possibility in the context of defining "women’s interests").

201. See GOLDING, supra note 47, at 3-6 (distinguishing explanatory and justificatory reasons).

piration toward universality appears unachievable, I see as attainable the more modest goal of identifying or forging partially shared understandings that can help legitimate judgments. Moreover, perhaps the aspiration for universality does not require unanimous agreement. The perception that a wide range of perspectives respectfully were included in the decision-making process, and thereby had the opportunity to influence the constitutional meaning that emerged, can also add to the judgment's legitimacy.

Shared recognitions, I think, are crucial to support the legitimacy of a constitutional decision. Constitutional decisions, in fact, always have relied upon them. But this reliance, which has been largely implicit, now needs to become more overt. To enhance its legitimacy, the Court must consciously identify and portray in its opinions shared recognitions that can help support its constitutional meanings.

Identifying these shared meanings is best accomplished by an interactive methodology, which requires the Court to engage actively with different perspectives on constitutional meaning during the decision-making process. The Court should not choose a constitutional meaning by other means and then search for agreement. Instead, the Court should enter the decision-making process willing to listen to, and consider, different perspectives.

---

203. See, e.g., Sunstein, supra note 14, at 103. Sunstein notes: It is often true that a text has a plain meaning, or that there is no room for interpretive doubt. But when this is so, it is because there is no disagreement about the appropriate background principles. It is not because there is a preinterpretive 'fact' that people can uncover without resort to substantive principles.

204. See Feldman, supra note 202, at 1229, 1253 (noting that convergence on a judgment suggests its objectivity, which in turn is closely related to the issue of law's legitimacy).

205. Others have called this methodology "dialogue." See, e.g., Michael J. Perry, Love and Power: The Role of Religion and Morality in American Politics (1991) (calling for ecumenical political dialogue); Feldman, supra note 202, at 1223-26 (arguing that a dialogical methodology best promotes an achievable version of objectivity); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 653-54 (1993) (arguing that judicial decisions are best described as the result of dialogue); Michelman, supra note 89, at 1502 (calling for the transformation of constitutional adjudication into a "jurisgenerative dialogue"). Jürgen Habermas is an important source of the idea of dialogue as the methodology for legitimate decision making. See Jürgen Habermas, Legitimation Crisis (Thomas McCarthy trans., 1975); Jürgen Habermas, Moral Consciousness and Communicative Action (1990); Jürgen Habermas, The Philosophical Discourse of Modernity (1987) [hereinafter Habermas, Philosophical Discourse]; Jürgen Habermas, The Theory of Communicative Action (Thomas McCarthy trans., 1984) [hereinafter Habermas, Communicative Action]. Legitimate decision making, according to Habermas, should be a conversation among "free and equal members in a cooperative search for truth." Jürgen Habermas, Justice and Solidarity: On the Discussion Concerning "Stage 6", in The Moral Domain: Essays on the Ongoing Discussion Between Philosophy and the Social Sciences 235 (Thomas E. Wren ed., 1990), and all those whom a judgment affects should consent to it, Jürgen Habermas, Discourse Ethics: Notes on a Program of Philosophical Justification, in Moral Consciousness and Communicative Action, supra, at 157. My problem with the terminology stems from my problem with Habermas's theory—both represent an ideal that is so far from what the Court is likely to achieve in the foreseeable future that I hesitate to use them. By "interactive methodology" I mean to pare down the ideal to represent a conversation where the inclusion and the elimination of power discrepancies is necessarily incomplete.
and perhaps be persuaded by, different perspectives on constitutional meaning.\footnote{206}

How can the Court find these different perspectives on constitutional meaning? Of course, it is impossible, as a practical matter, to involve the entire public in constitutional decision making. But the legitimacy that comes from augmenting perspectives need not occur immediately or be achieved completely to enhance the legitimacy of the result. The current amicus brief practice provides a vehicle for starting down the road toward greater participation of previously excluded perspectives in ascertaining the values that underlie constitutional decision making. At this time, the Court infrequently, or at least erratically, reads or considers these briefs. If the Court were to consider seriously the perspectives which amicus briefs present, the level of participation could change, thus potentially presenting a wider range of perspectives that, if considered and understood, could enhance the intersubjectivity of the result.

Articulacy and an interactive methodology can work together to make each richer and more complex. Articulacy requires an effort to put into words the moral vision that underlies particular constitutional meanings. The combined aspirations toward articulacy and an interactive methodology lead to the aspiration that the Court listen to and compare different perspectives on constitutional meaning in light of the visions of the good that they represent.

This complex evaluation of perspectives would enhance the legitimacy of constitutional interpretation in a number of ways. Considering more perspectives in greater depth enhances the possibility of recognizing previously unnoticed commonalities among perspectives. The demonstrated convergence of perspectives on the constitutional meaning can help demonstrate the core aspects of legitimacy—that the result is based on convergence rather than personal preference and, in part because of the convergence, is worthy of respect.

In addition to adding the weight of common perspectives to the result, other reasons to search for previously unrecognized connections among perspectives can add to legitimacy.\footnote{207} One reason is that recognizing connections makes it more likely that participants will find common ground. Participants may disagree as to the ultimate result, but agree at various points along the articulacy chain. Articulating these points of agreement joins the participants, perhaps making their

\footnote{206. See Bartlett, supra note 143, at 881 (A valid decision requires that the decision maker make an "effort to extend [its] limited perspective" by attempting to "identify and understand the perspectives of others.").}

\footnote{207. On the value of participation in decision making, apart from its results, see HANNAH ARENDT, THE HUMAN CONDITION 22-38 (1958); BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 150-55 (1984); PERRY, supra note 205, at 122-27; WILLIAM M. SULLIVAN, RECONSTRUCTING PUBLIC PHILOSOPHY 155-70 (1980).}
points of disagreement less acrimonious. Another reason to seek various levels of connection among perspectives is that, after ascertaining an underlying moral connection at a general level, the decision maker must justify a divergence in points of view at a specific level. Sometimes the divergence will depend upon ascertainable facts that can dissolve the disagreement.

"Even when we understand them, [however,] some voices will lose." This is the inevitability of constitutional decision making—the Court must choose among contested meanings. The "augmenting perspectives" aspect of legitimacy does not dictate how the Court should do the choosing. Specifically, the requirement that the Court augment its own perspectives does not dictate that it choose the majority point of view, or any particular point of view. Rather, the process should add legitimacy to the result, whatever it may be. An important aspect of legitimacy is that even the losers respect the judgment, or at least respect the Court's constitutional decision-making process. The Court's interaction with competing perspectives in the decision-making process can help create this aspect of legitimacy.

Most fundamentally, legitimacy comes from the honest recognition of difference rather than a subterfuge. As to the public perception of the decision, "lack of candor seldom goes undetected for long, and its detection only serves to increase the level of cynicism about the nature of judging and judges." Honesty about the fact that the Court can render a constitutional decision in light of differing valid perspectives on constitutional meaning treats the public as "capable of dealing with the truth" that value judgments must be made. Those whose perspectives the decision does not adopt receive the independent value of being listened to and understood. Honesty as to why the Court did not adopt their perspective treats them also as capable of understanding that choices must be made and their perspectives, at

208. Obviously, decreased acrimony will not always be the result of increased articulacy. Some perspectives contain as their premises intolerance of other points of view. See, e.g., Linda J. Lacey, Mimicking the Words, But Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence, 35 B.C. L. Rev. 1, 16 (1993) (noting that a number of the "absolutely held beliefs" of religious fundamentalists "are deeply sexist, racist, and homophobic") (citation omitted). As to the incompatibility of such views with an interactive methodology, see Daniel O. Conklee, Religious Purpose, Inerrancy, and the Establishment Clause, 67 Ind. L. J. 1 (1991); David M. Smolin, Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry, 76 Iowa L. Rev. 1067 (1991).

209. Minow, supra note 143, at 92 (citation omitted); see also MARTHA C. NUSBAUM, THE FRAGILITY OF THE GOOD 32-47 (1986); J.M. Balkin, Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131, 1167 (1994) ("We have some duty to speak in the language of the Other, but our duty is not infinite. . . . [I]t is not only appropriate but necessary for us to recognize that the Other's views are incoherent or unjustified, and that our own position is more reasonable.").


211. Shapiro, supra note 145, at 737.

212. Id.
least this time, were not chosen. Moreover, clarity about the reason for rejecting the perspective allows these participants to evaluate the reason and to focus current and future critical review. In addition, acknowledging that perspectives other than the one chosen can exist preserves them as a part of the decision-making process in a way that rejecting them as faulty or not acknowledging them at all does not. This acknowledgment puts and keeps the perspective in public view even though it is not chosen, thereby leaving the perspective available for current and continuing critical review.

Some may argue that such candor in rejecting perspectives damages rather than enhances the legitimacy of the result, because the explicitness of the explanation may be more hurtful or insulting than an acknowledged, implicit rejection. This assumption, however, may minimize the extent to which the implicit rejections are felt already as hurtful and insulting. The assumption depends to a great extent upon the ideas that the holders of the rejected perspective do not perceive the rejections or, perhaps, that they are less likely to blame the decision maker for rejecting their perspective when the decision maker appears not to recognize what it is doing. Both of these ideas, in turn, depend upon the illusion that the Court either is not rejecting valid perspectives on constitutional meaning or does not know that it is doing so. As I have demonstrated, at least in highly controversial cases, the illusion no longer works. In this type of situation, the illusion does not legitimate a stance that fails to acknowledge and explain the choice of perspective and such a stance loses legitimacy because of its apparent lack of candor or understanding. Although highly controversial cases clearly generate strong feelings, it is much less clear that a strategy of submerging, rather than addressing honestly, those differences enhances the legitimacy of the necessary choice.

In short, a conscious effort to augment perspectives in the decision-making process can go some of the way toward establishing an authoritative grounding for constitutional decisions. Although the Court cannot possibly include all perspectives on constitutional meaning in the decision-making process, it can include some. The efforts the Court makes toward inclusion will enhance its interpretive legitimacy to that extent. I would be satisfied if the Court would start by simply addressing respectfully and with an effort toward articulacy the perspectives embodied in the various concurring and dissenting opinions offered in any one case. Then, the Court could expand its discussion to consider perspectives offered in amicus briefs. Finally, in some cases, the Court might, in fact, request that those with various perspectives participate in the decision-making process. Any of these efforts would add to the legitimacy of the constitutional result.
D. Honesty

All of the components of legitimacy that I have discussed depend most basically upon judicial honesty. One might think that the proposition that constitutional decision makers should not deceive their audiences would need little defense, but apparently it does. Moreover, my idea of judicial honesty goes beyond what critics have typically identified as the "problem of candor" in judicial decision making. The honesty that I believe is necessary to establish the legitimacy of constitutional decision making indeed requires decision makers "to search out and disclose the 'deepest' explanation of [their] actions." It requires discipline and effort, and represents a change in how the Court quite obviously views its judicial function. I thus offer a defense of candor in constitutional decision making and in the portrayal of the decision-making process in the judicial opinion.

In light of the fact that constitutional decision makers must make controversial value judgments, candor in constitutional decision making means a number of things. Most fundamentally, candor requires that the decision maker acknowledge the inevitable value judgments as such. This acknowledgement leads to the additional acknowledgement that, with value choices, no basis for declaring one choice correct and the other incorrect is universally recognized. Thus, honesty involves the additional acknowledgement that multiple valid perspectives on constitutional meaning may exist. Because of this possibility, candor requires the decision maker to acknowledge the partiality of its own perspective. Further, because of the necessary constraints on the decision maker's ability to augment its narrow perspective, honesty requires the decision maker to recognize the necessarily limited nature

213. See Altman, supra note 76, at 296-97 (describing it as a "consensus position" within the legal academy that judges "should become aware of and disclose the real reasons for their decisions"); Shapiro, supra note 145, at 738 ("[W]ho, after all, would be Grinch-like enough to argue for lack of [judicial] candor?").

214. See Altman, supra note 76, at 299 (suggesting that "encouraging judges to understand their decision process better, if effective at all, could be harmful, would probably not succeed, and even if successful might not be worth doing"); Shapiro, supra note 145, at 739 (noting that "the literature" contains "many eloquent statements of the need for some form of selective deception, or at least nondisclosure, in the plying of the judge's trade").

215. See Shapiro, supra note 145, at 736 ("[T]he problem of candor . . . arises only when the individual judge writes or supports a statement he does not believe to be so.").

216. Id. at 738 n.33.

217. See, e.g., Paul Brest, Constitutional Citizenship, 34 CLEV. ST. L. REV. 175, 188 (1986) ("Considering issues from the moral point of view requires habits and attitudes that come from regular practice."); cf. Barbara J. Flagg, "Was Blind But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent, 91 MICH. L. REV. 953, 957 (1993) ("We can work to make explicit the unacknowledged whiteness of facially neutral criteria of decision . . .").

of the ultimate decision. It may be the best decision possible, but it is not perfect. Thus, honesty requires conforming the presentation of the decision with what the decision can possibly achieve.

The honesty I advocate would enhance the legitimacy of constitutional decision making in numerous ways. Most fundamentally, acknowledging the value judgments that must occur in constitutional decision making establishes symmetry between the nature of the decision and its presentation and thereby removes the contradiction that currently undermines the Court's interpretive legitimacy. Specifically, a Court that is honest about what it is doing in the interpretive process no longer exposes itself to claims that it is naive or deceptive. Such honesty also transforms the judicial opinion from a strategic to a genuinely communicative act.\(^{219}\) Opinions framed as strategic action can be expected to evoke similar strategic responses from the public audience. By contrast, communicative actions treat the recipients as worthy of respect, rather than as objects to be manipulated.\(^{220}\) Legitimacy, which comes from respect for the decision maker and the decision-making process, would seem to require this type of honesty as a basic prerequisite.

Moreover, in contrast to a formal mode of presentation, attempting through articulacy to examine and explain the value judgments creates the possibility of legitimating the choice as independent of personal preferences and worthy of respect. Acknowledging that constitutional decision making requires value choices and exercising articulacy also exposes interpretive methods, such as originalism, which often presume sources of meaning to be foundational, to require articulate justification as well.\(^{221}\) Honesty about the nature of the constitutional decision-making process puts all interpretive choices on the same footing—requiring a demonstration that they meet the demands of legitimacy.\(^{222}\)

\(^{219}\) Jürgen Habermas makes this distinction in creating his theoretical model of discourse ethics. See 1 HABERMAS, COMMUNICATIVE ACTION, supra note 205, at 340-43. He first distinguishes two realms of human activity—one geared toward truth seeking and understanding and the other geared toward efficient economic production and interaction. He then distinguishes what he calls strategic action from communicative action. Communicative action is oriented toward understanding, whereas strategic action is meant to obtain the goals of the speaker through means other than understanding, including dishonesty and manipulation. HABERMAS, PHILOSOPHICAL DISCOURSE, supra note 205, at 355. Only communicative action can be the basis for a legitimate decision, for otherwise the decision will be the result of the exercise of power rather than mutual understanding and agreement.

\(^{220}\) See HABERMAS, PHILOSOPHICAL DISCOURSE, supra note 205, at 355; see also Shapiro, supra note 145, at 736 ("[T]he case for honesty in all human relations ... rests in part on the importance of treating others with respect.").

\(^{221}\) See, e.g., SUNSTEIN, supra note 14, at 101 ("[The underpinnings of originalism] need to be defended ... [and] would have to be based on something other than history.").

\(^{222}\) See, e.g., DWORKIN, supra note 150, at 260 (acknowledging that there are no "politically neutral interpretive convictions"); PERRY, supra note 205, at 132 ("Whether to pursue a
Another aspect of honesty in judicial opinion writing is acknowledging the necessary limitations of any judgment reached.\textsuperscript{223} Constitutional decision makers are human, and they have limited capacities to meet the demands of legitimacy.\textsuperscript{224} Decision makers may attempt to expose and examine the sources of their value judgments, but this task is potentially endless, and ultimately requires a transcendence of individuality that probably is not achievable.\textsuperscript{225} Decision makers also can attempt to portray their decision-making process and its result in a way that the public will deem worthy of respect. As we know, though, it is impossible to please everyone. Thus, respect, like independence of personal preferences, must come in degrees.

Given these recognitions, judicial honesty includes the additional recognition of the imperfect nature of legitimacy itself. Decision makers can only try to make the best choices under the circumstances that currently exist. This is not to say that constitutional decision makers should not strive to articulate enduring constitutional meanings. Rather, their efforts to do so will be limited by their situations. Honesty in a judicial opinion requires that the decision maker acknowledge this. By doing so, the decision maker limits the definition of legitimacy toward which it strives. Because the definition is more limited, it is more achievable. Thus, by acknowledging the necessary partiality of any chosen constitutional meaning, the Court in fact can enhance, rather than reduce, the legitimacy of its result.

Honesty, as embodied in all of the components of legitimacy that I have discussed, also adds to the legitimacy of a decision by opening it to ongoing critical review. This greater openness effectively allows those who ultimately embrace the substance in part or in whole as their own to do so.\textsuperscript{226} Unlike a decision that is unclear about its sources of meaning, and thus relies for its legitimacy solely on the articulation of its result, a decision that honestly attempts to portray its own sources both deeply and as emerging from the interaction of different perspectives on constitutional meaning creates the possibility of wider public affirmation. For those who continue to disagree with the choices made in the constitutional decision, its openness neverthe-
less provides the promise of ongoing critical review of the result and its sources.

I know that incorporating this level of honesty in constitutional opinion writing is risky.227 Scholars have made various arguments in support of judicial ignorance228 and benevolent judicial deception.229 These arguments all generally reduce to the claim that the Court, or the public, are better off not knowing exactly how the Court reaches its decision because otherwise the public will lose respect for the process and the Court's decisions will lose legitimacy.230

These arguments, however, depend upon the success of the deception.231 My discussion of the several examples in part I indicates that the Justices' opinions in single cases, when read together, dispel the illusion upon which the legitimacy of any one of them depends. At least in these very difficult cases where it is quite obvious that value judgments are being made, the formalist illusion fails.232 In these circumstances, lack of candor not only does not enhance the perceived legitimacy of the decision, but when it is detected, breeds cynicism rather than respect.233

Because the success of the illusion of formal legitimacy may vary from case to case, the Court could perhaps experiment in its most controversial cases with the components of legitimacy that I propose because, in these cases where the formalist assumption is most untenable, the Court has the least to lose. If, as I believe, displaying these components in the judicial opinion leads to increased respect for the process and its results, then the Court could adopt the method on a

227. See Martin M. Shapiro, Law and Politics in the Supreme Court 27 (1964) ("It would be fantastic indeed if the Supreme Court, in the name of sound scholarship, were to disavow publicly the myth upon which its power rests."); Altman, supra note 76 (arguing that introspective judicial decision making could lead to less constrained, and therefore less legitimate, decision making); Michael D. Daneker, Moral Reasoning and the Quest for Legitimacy, 43 Am. U. L. Rev. 49, 53 (1993) (Judicial opinions that employ Lawrence Kohlberg's stage-four "law and order" legal reasoning "may confer greater legitimacy on the act of judicial decision making than other types of moral reasoning" because lawyers are accustomed to it.); see also Taylor, supra note 21, at 107 (noting the risk that "articulacy will buy us much greater inner conflict").

228. See Altman, supra note 76.

229. See Larry Alexander & Emily Sherwin, The Deceptive Nature of Rules, 142 U. Pa. L. Rev. 1191, 1193 (1994) (arguing for a system of "esoteric government, in which the governed are not fully aware of the nature of the system that governs them"); Shapiro, supra note 145, at 738-50 (addressing five instances in which scholars have argued that judges should not be completely honest about their decision-making process).

230. See Frank, supra note 20, at 157 ("Fear of legal uncertainty leads to [judicial] concealment.").

231. See Thuman Arnold, The Symbols of Government 237 (1935) ("Folklore which is frankly recognized by a people to be folklore is from that moment no longer folklore.").

232. I happen to think that the deception is obvious not only to those of us in the scholarly heights, but also to the public more generally. It is for this reason that I take issue with academic invocations to judicial deception. See, e.g., Alexander & Sherwin, supra note 229. I think a large portion of the public sees through judicial efforts to deceive, which makes the benevolence of the deception insulting.

233. Shapiro, supra note 145, at 737; see also Frank, supra note 20, at 157 ("[Judicial] concealment has . . . made the labor of judges less effective.").
wider scale. The whole premise of components of legitimacy, rather than one complete vision, means that legitimacy comes in increments. It is entirely possible, therefore, to attempt to achieve these components in degrees instead of in one fell swoop.

The fact that the components of legitimacy can be effective even if implemented incrementally addresses another criticism of honesty—that the components of legitimacy require a Herculean judicial effort, impossible for constitutional decision makers actually to achieve.234 But this criticism appears more devastating to the ideal of formal legitimacy which judicial opinion writing currently embodies rather than to the components of legitimacy previously discussed. As I view it, the ideal of formal legitimacy is all or nothing. Either sources are foundational or they are not. If they are not, then the chain of formal judicial reasoning loses its legitimacy.

By contrast, my components of legitimacy help build a grounding for the constitutional decision that can give it legitimacy. Any judicial effort toward achieving these components thus adds some legitimacy. The components' incremental character makes it possible to weigh the value of achieving each component fully against other values, such as efficiency or even, in particular cases, the value of deception.235 The components are flexible, and, therefore, can bend to accommodate the real life demands of constitutional adjudication. My point is simply that, all other things being equal, they can add a legitimacy to constitutional decision making that the assumption of formal legitimacy cannot. The type of honesty that my components demand in judicial decision making thus represents an appropriate aspiration.

IV. THE METHOD OF ARTICULATE DECISION MAKING

Part II established the components of a legitimacy that can replace the assumptions of formalism apparent in the Court's constitutional decisions. In this part, I combine these components into a method called articulate decision making. Articulate decision making would enhance both the substance and the perception of the Court's constitutional interpretive legitimacy. As to substance, the explicit method would guide and impose a discipline on the decision-making process that would make it more likely that the constitutional meaning would have interpersonal validity and otherwise be worthy of respect. As to perception, the revised substance would allow the Court

234. See, e.g., Dworkin, supra note 150, at 245 (naming his hypothetical decision maker Hercules and noting that to accomplish the ideal he would need to have "superhuman talents and endless time").

235. See Shapiro, supra note 145, at 750 (limiting his defense of judicial candor to account for "extraordinary occasions" when moral imperatives outweigh the value of truthfulness).
to replace its aspirations to formalism with an explanation of its decision making more likely to demonstrate these crucial aspects of legitimacy.

The articulate decision-making process consists of several stages that necessarily interact. For clarity I will first discuss each of the steps and then discuss their potential interaction.

A. The Substance of Articulate Decision Making

The decision-making step of the articulate decision-making procedure involves two stages, one nonevaluative and the other evaluative. It is crucial that the decision maker observe the discipline of both of these stages because the legitimacy of the second builds upon, and thus to a great extent depends upon, the success of the first.

1. Nonevalutative Listening

The first step in the articulate decision-making process is the decision maker's true listening to the available perspectives on constitutional meaning. Initially, this step requires that the decision maker acknowledge all of the perspectives before it as valid as perspectives.\(^{236}\) The decision maker must go through the mental exercise of acknowledging that the observers' different situations may make the issue to be decided appear differently to different people. In the process of doing this, the decision maker must also acknowledge the partiality of its own perspective. The effort at this stage must be, to the greatest extent possible, to try to understand which different situations led to the different points of view.\(^{237}\) The understanding sought should be both logical and emotional.\(^{238}\) The greater the level of understanding, the greater the legitimacy of the ultimate evaluation as independent of the decision maker's purely personal preferences.\(^{239}\)

\(^{236}\) The feminist practice of consciousness raising employs similar assumptions. See Bartlett, supra note 143, at 863-67.

\(^{237}\) Minow, supra note 143, at 57 ("Before justice can be done, judges need to hear and understand contrasting points of view.").

\(^{238}\) Perry, supra note 205, at 98 ("[D]ialogue can be a process through which hearts as well as minds are changed."); Posner, supra note 2, at 851 ("The proper conception [of interpretation] is knowledge by empathy.").

\(^{239}\) Although it may appear distasteful to acknowledge all proffered perspectives as valid at any stage in the decision-making process, nothing short of this discipline can ensure that worthy perspectives are not dismissed without explanation. The decision maker's acknowledgement of different perspectives on constitutional meaning and explanation of why some are chosen and some are not is a crucial aspect of the legitimacy of the evaluation stage. To the extent that some perspectives are widely viewed as unacceptable, this can serve as the explanation for rejecting them as appropriate for guiding constitutional decision making. The honesty requirement of articulate decision making demands, however, that they at least be acknowledged and their rejection explained.
At a minimum, the Court should read and consider honestly both the briefs presented to it in any particular case and the perspectives set forth in concurring and dissenting opinions. To achieve the fullest possible understanding of the different perspectives on constitutional meaning presented in a case, the Court should consider not only the range of different perspectives offered, but also each perspective in terms of the moral vision that informs it. Thus, when considering apparently conflicting perspectives on constitutional meaning, the decision maker should attempt to understand what causes the difference, whether it be a divergence in a foundational vision of the good or some later divergence.

In County of Allegheny, for example, the Court had before it the briefs of the parties and seven amicus briefs. In addition, the opinion set forth a number of other perspectives offered by the Justices themselves. An articulate decision in the case would require that the Court consider all of these perspectives, not only as to result, but also as to underlying moral vision. Because the amicus briefs generally follow the formal pattern of the Court’s opinions, the task of considering the perspectives in depth would not be easy. The form of the amicus briefs, however, corresponds to the perception of what constitutes effective advocacy, and a change in the Court’s decision-making process could change both this perception and, consequently, the form of the briefs. As the method of articulate decision making develops, it would need to make the participants in the constitutional decision-making process responsible for presenting their positions according to the requirements of articulacy.

In any event, to the extent that the decision maker can trace the path of other perspectives, this exercise will help the decision maker understand the particular circumstances that contributed to the perspective, and will give the decision maker insight as to whether the circumstances should be relevant to public constitutional decision making. In a case like County of Allegheny, the Court could at least try to make this effort. Clues to the moral visions that inform these positions exist. This process of attempting to fully understand the


241. See supra part III.C.

242. These clues are best found in the preface to each brief, where the party states its interest in the case, perhaps because this is where the parties feel most free to openly acknowledge their own points of view. After this statement, the briefs by and large present formal arguments that history and Supreme Court precedent dictate their chosen result. See, e.g., Amicus Curiae Brief of Concerned Women for America in Support of Petitioners at 1, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (No. 87-2050) (“The purpose of CWA is to preserve, protect and promote traditional and Judeo-Christian values . . . .”); Amicus Curiae Brief of the National Legal Foundation, In Support of Petitioners at 1, County of Allegheny v. ACLU, 492 U.S. 573 (1989) (No. 87-2050) (“If the displays are prohibited, 'a pall of secularism that denies history will descend upon all of American public life.'”).
various proffered perspectives and the reasons for their differences is crucial to the next step in articulate decision making, the critical examination by the decision makers of the diverse perspectives on the issue in order to reach a decision.

2. **Evaluating**

The very nature of making a decision is that, at some point, the process must become evaluative. The nonevaluative stage of the articulate decision-making process adds the legitimacy of inclusion to the decision-making process. The evaluative process, however, must to some extent exclude perspectives. Moreover, a universally acknowledged normative ground for choosing among different perspectives does not exist. At this stage, articulate decision making enhances legitimacy by clarifying the manner of excluding perspectives and, where appropriate, preserving perspectives as valid instead of rejecting them as invalid.

A decision maker might choose one perspective on constitutional meaning over others for a number of reasons. A crucial variable is whether the decision maker rejected the perspective because the decision maker deemed it wrong or for some other reason. Articulate decision making requires the decision maker to acknowledge which fork in this decision-making process it travels, and a sufficient explanation for the decision would vary according to the path chosen.

On the one hand, a decision maker may reject a perspective as invalid. If so, it would need to acknowledge this fact and explain why the perceptions are faulty. These explanations would relate to the nature of perceiving—the participant does not have all the information, does not know her own interests, has been unable to critically assimilate different perspectives in evaluating her own, or the values embodied in the perspective are so abhorrent to the community that the decision maker is willing to declare them untrue.243 Whatever the particular reason, the decision maker must acknowledge the fact that it is declaring a perspective to be wrong and, thus, must take responsibility for proclaiming one perspective more true.

This requirement would likely limit the number of times that a decision maker rejects perspectives as invalid by making the act of doing so more deliberate. By limiting the extent to which a decision maker rejects a perspective as invalid, articulate decision making

243. This addresses, for example, the concern that some extremely intolerant perspectives should not be treated as potentially valid by constitutional decision makers. Articulate decision making allows for this possibility. It simply requires that the decision maker acknowledge that it is rejecting a perspective and clearly state why.
gains legitimacy by preserving more perspectives as potentially valid even after the ultimate decision is reached.

Even for those whose perspectives are declared invalid, articulate decision making has greater legitimacy than the current method of rejecting perspectives on constitutional meaning without explanation, because these participants would at least receive an explanation as to why the decision maker declared their perspectives wrong. The act of giving a candid explanation accords the participants a degree of respect lacking in the current practice of ignoring or dismissing alternate points of view. Moreover, the explanation of why the decision maker rejected a perspective acknowledges the fact of rejection, and thereby exposes that fact and the explanation to critical review. The legitimacy of the Court’s decision to reject a perspective as invalid comes both from its honesty in doing so and from the public perception that the rejection is worthy of respect. The latter sometimes may not be accurate, but even if the rejection of the perspective is perceived as wrong, it may be perceived as legitimate nevertheless because the candor of the opinion opens the decision-making process to ongoing critical review.

As an example here, the opinions of the Justices in County of Allegheny suffice to make the point. Each opinion declares at least one other opinion wrong. But does the dispute among the Justices in County of Allegheny actually relate to the nature of perceiving? Arguably, the Justices on either side have not been able to assimilate critically different perspectives in evaluating their own. Justice Blackmun’s opinion for the Court does not display a sensitive recognition of the impact of prohibiting public displays of traditional religious symbols on those to whom the displays are deeply meaningful. Nor does Justice Kennedy’s opinion evidence a recognition of the significance of feelings of exclusion on those who view public displays of religious symbols that are not their own. An adequate explanation for rejecting either of these opinions as wrong would require acknowledging the reason for this rejection, and, once acknowledged, would require the one rejecting the other to demonstrate that his opinion does not suffer from the same defect. A failure to do so would expose the result to criticism once issued. This criticism could, in turn, hasten reconsideration of the result. Because I think it would be difficult for the Justices in County of Allegheny to make such a demonstration, the more probable result of this explicit requirement of explanation is that the opinions would acknowledge that they cannot reject the other perspective.

244. See County of Allegheny v. ACLU, 492 U.S. 573, 612 (1989) (Blackmun, J.) (stating that the Court’s decision is “incontrovertible”); id. at 668 n.6 (Kennedy, J., concurring in part and dissenting in part) (marveling at the depth of the Court’s error).
as wrong. They would have to accept other perspectives as valid as perspectives.

If a decision accepts a number of perspectives as valid as perspectives, it nevertheless must choose among them to the extent that they conflict as to a substantive result. In this type of case, the decision maker would need to explain in terms other than the nature of perceiving why the decision maker prefers one perspective on constitutional meaning over another. To be convincing (that is, to truly give reasons) in a hard case, the explanation would have to be tied to the moral vision that informs it. Further, the decision maker’s reasons for the choice would have to justify sufficiently the result in light of conflicting, but potentially valid, perspectives. Thinking through this process should improve the critical worth of the decision by encouraging the decision maker to be honest initially about its assumptions and perspectives.

Requiring articulacy in explaining the basis of a constitutional decision makes the process of evaluating different perspectives on constitutional meaning more complex, but also potentially more fruitful. Ideally, in the evaluation process the decision maker should listen to and compare perspectives both as to specific result and underlying moral vision. This creates the possibility of many different meshings and conflicts among perspectives. Perspectives may differ as to the result in a particular case but agree as to the sources of constitutional principles, or vice versa, or they may agree and clash at several points along the line from the moral sources to the more particular result. An articulate decision maker ideally would evaluate its choices from the specific decision down to the underlying sources of constitutional meaning.

For example, the Court’s evaluation process in cases that, like Casey, involve the constitutional protection of the abortion decision would have to focus on the different moral visions that lead to different specific results. These moral visions quite obviously place different values on fetal life and a woman’s ability to control her body. The evaluation process would have to address why this is so, and it could omit neither the necessary evaluation of the nature of human life nor an acknowledged choice about the attributes that are necessary to be a member of the constitutional community.

Similarly, in cases involving the constitutional restrictions on the intersection of government and religion, like County of Allegheny, the evaluation process would have to focus on religion and its place in the vision of the good that informs constitutional meaning. To the extent that the Constitution is said to restrict public displays of religious symbols, the decision maker would need to consider not only how that restriction benefits the feelings of religious outsiders, but also why that benefit is a greater good than the feelings of identification others
would have were the displays permitted. On the other hand, to the extent that the Constitution permits public use of religious symbols, the evaluation would have to be in terms of the good realized thereby as compared to alternate goods that are necessarily foreclosed.

**B. Creating the Perception of Legitimacy**

Of course, every stage in the articulate decision-making process involves articulation by various participants in various ways. The written opinion, however, is the decision maker's formal articulation to the public, explaining the discovery and generation of the public values that inform the constitutional principles that it announces.

Most fundamentally, the decision maker must craft the written opinion so that it represents a genuine attempt at communicative action between the decision maker and the public.\(^{246}\) In addition, the written opinion must display to public view the extent to which the decision reflects the components of enhanced legitimacy built into the articulate decision-making process. As to augmented perspectives, the written decision would set out the range of perspectives considered.\(^{246}\) The written opinion would also display the evaluation process as explained earlier. Thus, the written decision would actively consider and evaluate these perspectives, rather than merely mention them.

Moreover, the opinion ideally would display both the specific perspectives on the issue to be decided and their most basic sources. The evaluation process displayed in the decision therefore would indicate the many commonalities and differences among perspectives. Further, in addition to using the method of articulacy to display the extent to which the constitutional meaning represents augmented perspectives, the written opinion would present whatever result it reached articulately—that is, couched within the broader moral vision that informs it. In all of these ways, the presentation of the constitutional decision would display, to the greatest extent possible, the structure upon which the particular constitutional meaning depends.

This written opinion requirement obviously would change the appearance of the opinions in cases such as *Casey* and *County of Allegheny*. Gone would be the caustic comments about each side's infidelity to constitutional meaning and the lengthy excursions through history and precedent to justify the chosen meaning. In their place would be the interactive examination of the values described above that should inform constitutional meaning. Of course, history and precedent might still be quite relevant to constitutional meaning, and

---

245. *See supra* note 207 and accompanying text.

246. This means that the written opinion should at least acknowledge the existence of the amicus briefs filed in the case.
caustic comments may be justified, but both would require explanation. This explanation would need to focus on the choice between competing conceptions of the good, which then could explain why history, precedent, or caustic comments would apply.

C. Interaction Between the Substance and Perception of Legitimacy

An articulate decision serves the important function of honestly recording the decision's past by displaying to public view what actually happened. Yet the legitimacy enhancing effect of the articulate decision-making process is more complex. The fact that it must produce an articulate decision as described above will necessarily affect the earlier decision-making process itself. The requirement of an articulate decision thus serves as the important discipline that ensures that the decision maker actually engages in the articulate decision-making process. The written opinion requirement works together dialectically with the process to result in a written opinion that represents a synthesis different from what could have been predicted at the start of the process.

By recording the past, the articulate decision also serves as a vehicle for change in the future decision-making process. Recording the process that occurred changes the expectations of what the process will be. Therefore, for example, more participants may decide to enter the process if it becomes apparent that the decision maker will treat their perspectives with respect. Greater participation in the constitutional decision-making process could increase its legitimacy by adding to the range of perspectives included, at least to the extent of being listened to, and perhaps to the extent of influencing the decision itself. The more perspectives considered, the greater the potential for the decision maker to demonstrate that the decision is independent of its own preferences. To the extent that the decision maker brings those previously excluded into the constitutional decision-making process by considering their perspectives, the decision may become more legitimate in the eyes of those individuals or groups.

The display and evaluation of the perspectives considered also might change the substance of participation. Because of the nature of legal advocacy, articulate decision making ultimately would place responsibility not only on the decision maker, but also on the participants. Participants in the decision-making process would learn that they must articulate their perspectives on the particular issue in terms of its motivating moral vision.

Of course, articulating such a perspective first requires determining what the perspective is: those who have not previously been asked or allowed to articulate their perspectives on an issue may not have
thought about what their perspectives are. The requirement of articulacy therefore may induce the creation of perspectives by indicating to previous nonparticipants that their perspectives will be included and considered, thereby causing these new participants to form a perspective by articulating it.\textsuperscript{247}

In addition, the process of articulating a perspective can change it, because articulation can lead to critical self-examination. The speaker may notice inconsistencies in the perspective when putting it into words. Once a speaker is asked to acknowledge a perspective as her own, she may examine it more critically to determine whether it is hers or rather something she has just accepted unquestioningly. In addition, claiming a perspective as her own requires the speaker to test the perspective against other perspectives and to choose to retain it. The crucial task of articulating a perspective thus requires effort on the part of the speaker. The speaker must identify a perspective as the speaker's own and take responsibility for it.

The requirement of articulacy within a perspective asks the participant to identify the deeper roots of the more specific perspective. This requires the participant to identify and acknowledge the personal and societal influences that lead to the perspective, which differ from those of others. This requires the participant to trace back the story that led to the current position.\textsuperscript{248} This process, too, may involve critical self-examination as the participant tries to make sense of the perspective and to articulate it in a way that others can understand it.\textsuperscript{249} In addition, requiring articulacy should cause a participant to compare his perspective with others at various levels, which may lead the participant to change his perspective.\textsuperscript{250} In any event, the process requires the participant to take responsibility for the perspective in a deeper way than currently is expected. This task, although onerous, could hone the perspectives on constitutional meaning presented to the Court, making the Court's efforts to understand and evaluate the perspectives more meaningful.

Thus, an articulate decision may change the expectations about participation in the constitutional decision-making process. Undergoing the introspection required to present an articulate perspective may, in turn, change the nature of the perspectives ultimately presented for review by the decision maker. This change may affect the ultimate result. In this way, the method of articulate decision

\textsuperscript{247} See Taylor, supra note 21, at 91 ("[G]oods [or perspectives] only exist for us through some articulation.").

\textsuperscript{248} Id. at 104 ("[T]he path to articulacy has to be a historical one.").

\textsuperscript{249} Perry, supra note 205, at 105-12 (noting requirement of intelligibility to participate in dialogue).

\textsuperscript{250} Michelman, supra note 89, at 1526 (stipulating that the dialogue he proposes presumes that some participants will change their perspectives as a result of the dialogue).
making could enhance the legitimacy of constitutional decision making on an incremental and continuing basis.

V. Conclusion

Like the Constitution, the Court's current method of presenting its constitutional decisions has a pedigree. 251 But as with the Constitution, the pedigree of the Court's opinion-writing style alone is now insufficient to sustain it. Rather, the Court's decisions must face the challenge of modernity—that absolute sources of authority are unavailable. Thus, logical reasoning from the traditional sources of constitutional authority is insufficient to justify, and thereby legitimate, the result. Moreover, the Court's pretense in its opinions that such justification suffices exposes it to the potent criticism that it is hiding and not adequately legitimating the value judgments upon which its decisions inevitably depend.

The Court must break out of this rut. It must acknowledge in its decision making its value judgments and attempt to justify them. As I have demonstrated, such justification is possible, contrary to what I suspect are the Court's fears. The twin components of articulacy and augmenting perspectives can supplement the traditional exercise of giving principles to legitimate constitutional decision making. Articulate decision making combines these components in a method that would harmonize the rhetoric and the reality of the Court's decisions, and thereby reestablish the Court's constitutional interpretive legitimacy as we enter the twenty-first century.

251. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (observing that judicial review of the constitutionality of legislative acts might not be available is "an absurdity too gross to be insisted on").