# INTERPRETING THE CONSTITUTION

Erwin Chemerinsky

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**Erwin Chemerinsky**

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To my sons,
Jeffrey and Adam—
May you live in a world where there
truly is liberty and justice for all.

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# Contents

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# Preface

The debate ranges on over the proper method of constitutional interpretation. In the popular arena, there have been recent speeches by the attorney general attacking the approach of liberal Supreme Court justices and replies by some justices defending their methodology.[1] In the scholarly literature, the flood of books and articles on judicial review continues.[2] In Supreme Court opinions, interpretive approaches are often openly discussed and frequently decisive in explaining the results in particular cases. A dramatic example is the Court's refusal last year to find constitutional protection in the right to privacy for consensual adult homosexual activity.[3] The Court justified its conclusion with a methodological claim about the inappropriateness of judicial protection of rights not clearly stated or implied in the Constitution.[4]

This book is part of the ongoing debate. It is written with the hope of changing the focus of the debate, clarifying the issues, and advancing an alternative vision of the role of the Constitution and the Court in our society. A central theme of the book is that the debate over judicial review has focused on the wrong questions. Much of the current discussion about constitutional interpretation has centered on how to reconcile judicial review with democracy defined as majority rule.[5] But, as I argue in Chapter 1, such a definition of democracy is neither descriptively accurate nor normatively desirable. Many aspects of U.S. government, most notably the Constitution, are intentionally antimajoritarian. The concept of majority rule is of little help in defining the role of an antimajoritarian institution—the federal judiciary—or in determining the meaning of an antimajoritarian document—the Constitution.

Likewise, much of the current debate has focused on a way to achieve objective, value-free judicial decision making.[6] But the legal realists long ago taught that judges have inherent discretion in deciding cases, especially in interpreting an

open-textured document such as the Constitution. Exercise of judicial discretion is inescapably affected by justices' values. No one is surprised when Justices Rehnquist and Brennan come to opposite conclusions even though both are committed to upholding the Constitution and both are conscientiously performing their duties.

Thus, a major focus of this book is critical, suggesting that much of the recent literature on constitutional interpretation is misfocused. Efforts to devise a method of judicial review that is consistent with majority rule or that eliminates discretion are doomed to fail. Chapter 1 details criticism of the focus of the ongoing debate and hence explains why I chose to write yet another examination of constitutional interpretation and judicial review.

This book also attempts to offer an alternative agenda for debate. The central question is, How should meaning be given to the provisions of the United States Constitution? Questions of the responsibility and role of particular institutions are important, but such questions should be considered only in the context of answering the larger inquiry.

The logical starting place for deciding the proper method of interpreting the Constitution begins with the question: Why should U.S. society be governed by a constitution at all? Constitutional interpretation is instrumental—it exists to accomplish the purposes of the Constitution. Logically, then, analysis should begin by considering why it is desirable to have government controlled by a written constitution. By ignoring this question and simply assuming the authoritative status of the Constitution, the current debate neglects a question that reveals a great deal about the proper method of constitutional interpretation. Chapter 2 addresses why society should be governed by a constitution, concluding that the U.S. Constitution serves the dual function of protecting deeply embedded values—separation of powers, equality, individual liberties—from the political process, and of serving as a powerful symbol unifying the country.

The purposes of the Constitution are especially important in answering two key questions that determine how it should be implemented: First, should the meaning of the Constitution evolve or remain static? And second, if its meaning should evolve, should the evolution be only by amendment or also by interpretation? The latter question is the key issue in much of the current popular and scholarly debate over judicial review. The "originalists," on the one hand, contend that the Constitution's meaning is limited to that which is clear from the text or intended by its drafters.[7] They argue that any change in the meaning of the Constitution must come through the amendment process. The opposing view, advanced by "nonoriginalists," is that the Court may protect values not stated or implied in the Constitution. Nonoriginalists contend that the Constitution should evolve by interpretation, not only by amendment.

Yet relatively little attention has focused directly on this question of whether the Constitution should evolve by amendment or interpretation. To answer the question, it is necessary to decide first how important it is that the Constitution's meaning evolve; only then can it be decided which method of evolution is best.

Chapter 3 focuses on the question of whether the Constitution's meaning should remain static or evolve, and Chapter 4 considers the issue of whether the evolution should be by interpretation or amendment. I conclude that the functions of a constitution, both in safeguarding fundamental values and in serving as a unifying symbol, can be attained only if the Constitution evolves through interpretation.

If it is established that the Constitution should evolve by interpretation as well as by amendment, the next question becomes, What institution(s) should have responsibility for that interpretation? All officeholders take an oath to uphold the Constitution, and all institutions of government interpret the Constitution. Members of Congress and state and local legislatures must make constitutional determinations in deciding whether to vote for a bill. A governor or president needs to evaluate constitutionality in deciding whether to sign or veto a proposed law. Thus, the question really is, Which branch of government, if any, should be authoritative in interpreting the Constitution? Chapter 5 addresses this question. I conclude that for numerous reasons the judiciary should have the final say (absent a constitutional amendment overturning its decision) over the meaning of the Constitution.

If the Court is to interpret the meaning of the Constitution, and if the meaning of the Constitution can evolve such that the Court is not limited to what the Framers intended, is there any limit on the interpretive process? Are there any restraints on the Court, and if so, what are they? Much of constitutional scholarship has been preoccupied with attempting to find an interpretive model that limits judicial discretion. Chapter 6 addresses these questions, arguing that inherently constitutional interpretation is, and should be, an indeterminate, open-ended process. By *indeterminacy*, I simply mean that there is no single correct answer to the vast majority of constitutional questions presented to the Court. Conscientious justices will inevitably come to differing conclusions about the meaning of specific constitutional provisions and their application to particular situations. It is futile to search for a model of constitutional decision making that is objective or discretion free.

Furthermore, I argue that if the Constitution is to serve its functions of protecting fundamental values and unifying society, the judiciary *should* have substantial discretion in determining the meaning of specific constitutional provisions. I recognize, of course, that discretion can be used for good or ill, and there is a risk of judicial discretion being used to frustrate social improvements and progress. Nonetheless, as developed in Chapter 6, I believe that, on balance, judicial discretion in constitutional interpretation is a good thing that will advance society. The chapter concludes by focusing on the objection that open-ended review risks judicial tyranny, describing why the foes of judicial activism substantially overstate the risks of judicial protection of constitutional values.

As is evident from the discussion above, I am doing more in this book than criticizing the current debate and suggesting an alternative agenda for discussion; I am advancing my views about the role of the Constitution in society. My central conclusion is that it is desirable for society to have an institution such as the Court,

which is not popularly elected or accountable, to identify and protect values that it deems sufficiently important to be constitutionalized and safeguarded from social majorities. I believe that the most important difference between a statute and the Constitution is that it is much harder to change the Constitution. Because of this immunity from easy alteration, the Constitution contains principles that should be relatively immune from majoritarian decision making. The structure of government is placed in the Constitution to prevent centralization of power, especially in times of crisis. Fundamental rights and protection of minorities are preserved through a constitution that is not easily altered and by a federal judiciary that is relatively insulated from political pressures.

But the Constitution only provides a sketch of how government should be structured and describes rights and protections only in general terms. Throughout this book, I argue that it is desirable to have a constitution written in fairly abstract language enshrining widely shared fundamental values about the proper structure of government and the rights of individuals. It is left for each generation to impart specific meaning to these deeply embedded abstract values.

I contend that the purposes of a constitution—especially protecting cherished values and safeguarding members of minority groups—can be best achieved by a judiciary with broad discretion in interpreting the Constitution. U.S. society is better off because the Supreme Court ordered desegregation of the South, applied the Bill of Rights to the states, decided that the Constitution protects the right of parents to control the upbringing of their children, compelled the reapportionment of state legislatures, held that people have a right to privacy, required the appointment of counsel in criminal cases, and prevented discrimination against disfavored groups such as women, aliens, and illegitimate children. I do not deny the risk of misguided judicial decisions, such as the infamous Supreme Court decisions earlier in this century frustrating social progress and the New Deal. Rather, I argue that, on balance, the benefits of decisions upholding individual liberties, enforcing separation of powers, and advancing equality outweigh the costs of the decisions that history later regards as mistakes.

I am not espousing a radical call for reform. Quite the contrary, I am simply defending what the Court has done throughout U.S. history. Time and time again for 200 years, the Court has explicitly recognized the discretion it possesses in interpreting the Constitution. The process of judicial decision making always has been, and should be, open-ended, with the Court interpreting all constitutional provisions, based on contemporary values.

The Constitution is society's best hope for safeguarding its most cherished values from the excesses of the democratic process. The judiciary, because of its political insulation and its method of decision making, is best suited to apply the Constitution to specific situations and articulate its meaning. By this theory, the judiciary is not given license to assume control of all U.S. government. Rather, the judiciary is given authority over one important aspect of it: the protection of those values deemed so important that they are enshrined in the Constitution.

Chapter 7, the final chapter, concludes by considering objections to this ap-

proach. I focus on the frequent claim that if the Court's review is open-ended, the legitimacy of the Court will be undermined. The threat of loss of judicial credibility is unsupported by any empirical or historical evidence and is belied by continued legitimacy despite decades of openly nonoriginalist decisions.

I realize that my theory about constitutional interpretation and judicial review only raises more questions. What values should be protected by the Constitution and the Court? What is the proper allocation of power under the Constitution? What is the appropriate content of terms such as *liberty*, *equal protection*, *freedom of speech*, and the like? I do not pretend to offer full or even partially developed answers to these questions. Although inchoate answers are implied throughout the book, each of these inquiries—questions about what the good society should be and how we should get there—is beyond my scope here. In this effort, I am content to focus on the method of constitutional interpretation and leave for others and perhaps my future writings to elaborate on the more profound and fundamental questions. To a large extent this book is foundational; if my argument is accepted, then the focus for constitutional law should be over what values are worthy of constitutional protection and how abstract values should be given specific meaning and applied to particular situations.

Thus, this is a book about how the Constitution should be interpreted and especially about the judiciary's role in that process. Although certainly I hope to persuade readers of the merits of my conclusions, at the least I seek to convince them that these are the right questions to ask. Hopefully, even those who disagree with my conclusions about the proper role of the Constitution and the courts in society might be persuaded that the grounds of the debate should be changed and perhaps find the agenda for discussion suggested here to be useful and clarifying.

Coincidentally, this book is published in the year of the Constitution's Bicentennial. I am not so presumptuous to think that I can resolve questions that have remained open for 200 years. I have little doubt that if U.S. society is governed by this Constitution for 200 years more, in 2187 many of these same questions about constitutional interpretation and judicial review will still be debated. I do not see the impossibility of resolution of the debate as an indication of its futility. Quite the contrary, its intractability should caution us to beware of those who proclaim that they have the one true way of interpreting the Constitution.

More important, the inability to resolve questions of methodology is a strong indication that the debate really is about substance, not procedure. During the 1930s it was the conservatives who were championing judicial activism, and it was the liberals, frustrated with the Court's invalidation of progressive legislation, who were crying for restraint. More recently, conservatives, disliking the Warren Court's advancement of individual freedoms and social equality, have attacked the Court's method and tried to develop models of review that would limit such liberal decisions in the future. Liberal academics have tried mightily to develop theories of judicial review that defend the modern Court's protection of freedom and equality.

In other words, when judges and scholars are arguing over the method of

judicial review, what they are really arguing about is what constitutes the "good" society and how it can best be achieved. These are the questions that people always have and always will argue about. The debate over constitutional interpretation is just a small part of that all-important ongoing discussion.

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# Interpreting the Constitution

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# 1 Why Another Essay on Constitutional Interpretation and Judicial Review?

The current obsession of constitutional law scholarship—whether activist judicial review can be reconciled with majoritarian democracy—is hardly new.[1] The controversy has reemerged as a result of attacks by conservative critics on recent Supreme Court decisions that protect rights neither mentioned in the Constitution's text nor intended by its Framers.[2] Judges and scholars such as William Rehnquist, Robert Bork, and Raoul Berger contend that the principle of majority rule is violated if judicial decisions are based upon values that are not stated or implied in the Constitution.[3] They argue that democracy requires unelected judges to defer to the decisions of elected officials unless there is a clear violation of the rights protected by the Framers of the Constitution.[4]

A number of prominent scholars have responded to this attack on the legitimacy of judicial review with theories designed to reconcile the Court's activist decisions with majority rule. Commentators such as Jesse Choper, John Hart Ely, and Michael Perry accept the premise of the critics of judicial review—that decisions in a democracy must be subject to control by electorally accountable officials—but maintain that their theories demonstrate why the Court can act to protect values not explicitly mentioned in the Constitution.[5] These authors' works have spawned numerous responses and even entire symposia examining whether judicial activism is appropriate in a democratic society.[6] The controversy has been characterized as a debate between the "originalists," who believe that the Court must confine itself to norms clearly stated or implied in the language of the Constitution, and "nonoriginalists," who believe that the Court may protect norms not mentioned in the Constitution's text or its preratification history.[7]

In this chapter, I argue that this debate over the legitimacy of judicial review is misdirected, futile, disingenuous, and dangerous. The debate is misdirected because it starts with a premise—all decisions in a democracy should be subject

to control by politically accountable institutions—that is neither justified nor justifiable. U.S. democracy does not, and should not, correspond to a purely procedural definition of democracy as majority rule. The Constitution purposely is an antimajoritarian document reflecting a distrust of government conducted entirely by majority rule. The Constitution protects substantive values from majoritarian pressures, and judicial review enhances democracy by safeguarding these values.

The current debate is futile because if democracy requires that all value choices be subject to control by electorally accountable officials, then nonoriginalist review, by definition, is not acceptable in a democracy. Judicial review is inherently antimajoritarian; unelected judges are overturning policies enacted by popularly elected legislatures. No model of judicial review can justify nonoriginalist judicial review if it begins with the premise that all decisions must be subject to control by electorally accountable officials.

The contention that judicial review is undemocratic is disingenuous at best. None of the critics of Supreme Court activism suggest that all judicial review should be eliminated. Yet *any* judicial decision that overturns a policy enacted by a popularly elected legislature is antimajoritarian; even judicial review based on the intent of the Framers is, by the critics' criteria, undemocratic. The originalists' only justification for allowing even limited judicial review is that it is functionally necessary to uphold the Constitution. However, if a functional justification for originalism is sufficient to outweigh the principle of majority rule, a functional justification should also be sufficient to sustain nonoriginalism. Because the originalist critics are willing to sacrifice majoritarian decision making to achieve their goals, their reliance upon democratic theory as the basis for their attack on nonoriginalism is both inconsistent and hypocritical.

Finally, the current debate is dangerous because the defenders of judicial review accept the critics' definition of democracy and thereby legitimize the claim that judicial review is unjustified unless it is made consistent with majority rule. The inevitable failure to reconcile nonoriginalist judicial review with this definition of democracy undermines the legitimacy of countless Supreme Court decisions, including those protecting privacy,[8] desegregating schools,[9] upholding the rights of women,[10] safeguarding freedom of speech,[11] and requiring that the states comply with the Bill of Rights.[12] None of these decisions can be justified by the text of the Constitution or the intent of its Framers.[13] In fact, because many of these decisions advance *democracy* as that term is commonly understood, the loss of these rulings would be dangerous according to the standards and values of all in the debate.

This chapter describes why the current debate over the legitimacy of judicial review is misguided. The first section describes the attack on nonoriginalist judicial review and the responses by the defenders of nonoriginalism. The second section of the chapter explains why the debate is misdirected—why both the attack and the defense focus on the wrong questions.

## THE CURRENT DEBATE

Virtually all participants in the debate over the legitimacy of judicial review begin with the premise that democracy requires that decisions be subject to control by majority rule. Michael Perry, for example, begins his analysis by briefly stating that majority rule is the controlling premise in a democratic society.

> We in the United States are philosophically committed to the political principle that governmental policymaking—by which I mean simply decisions as to which values among competing values shall prevail, and as to how those values should be implemented—ought to be subject to control by persons accountable to the electorate.[14]

Similarly, John Hart Ely spends little time defining what he means by *democracy* even though his book is described as an attempt to reconcile judicial review with "democratic theory."[15] At the beginning of his book, Ely simply postulates that rule by the majority "is the core of the American governmental system."[16] Perry and Ely are typical in defining democracy as majority rule. There are countless examples of commentators who begin their analyses like a recent scholar writing about constitutional interpretation:

> I claim that the United States is a democratic polity. By this I mean that . . . the nation is meant to be ruled by the majorities of its citizenry.[17]

Thus, the debate over the legitimacy of judicial review begins with the almost universally accepted premise that democracy requires that decisions be made by institutions and individuals who are accountable to the electorate.[18]

It is important to recognize that democracy is defined in purely procedural terms, as the method of adopting policies, not even partially in substantive terms, as the values that a democratic society desires, such as equality or freedom of expression. The underlying assumption is that government in a democracy should fulfill the preferences of its citizens "either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals."[19] It also should be noted that throughout the debate the term *democracy* is used interchangeably with phrases such as "majority rule" or "electorally accountable policy-making," although none of these concepts is defined with any precision.[20] At the very least, the participants in the current debate over judicial review can be criticized for their superficial consideration of the meaning of democracy and majority rule. Although the political science literature on the concept of democracy is voluminous, most constitutional scholars discussing democracy and judicial review simply begin with a short definition of *democracy*, seldom more than a few paragraphs.

Conservative critics of judicial review argue that permitting courts to strike

down legislative actions based on the judiciary's interpretation of the Constitution violates the democratic principle of majority rule.[21] If democracy is defined in purely procedural terms as a requirement that only electorally accountable officials make decisions, judicial review is undemocratic in two ways. First, the Supreme Court is obviously not a democratic institution by this definition because the justices have lifetime appointments and are not directly accountable to the electorate. Second, Court action thwarts the will of the majority by overturning policies enacted by officials popularly elected and democratically accountable. Alexander Bickel termed this tension between judicial review and majority rule the "counter-majoritarian difficulty,"[22] and it is this difficulty that is the center of the debate over the legitimacy of judicial review and the obsession of constitutional law scholarship.[23]

Similarly, if the definition of majority rule is phrased slightly differently as a requirement that all decisions be subject to electoral control, judicial decisions violate this principle because the electorate cannot overturn judicial decisions, directly or indirectly. Unless, of course, the possibility of reversing a decision by constitutional amendment is sufficient to constitute electoral control—in which case, all judicial constitutional decisions are consistent with majoritarianism. However, both proponents and critics of activist judicial review reject the amendment process as insufficient electoral control—although, again, they do so without developing a theory for determining what degree of electoral control is sufficient to meet their definition of democracy.

Conservative critics argue that nonoriginalist decisions are illegitimate because they allow judicial choices to overturn legislative and executive policies. Raoul Berger, for example, contends that "activist judicial review is inconsistent with democratic theory because it substitutes the policy choices of unelected, unaccountable judges for those of the people's representatives."[24] Judge Robert Bork similarly notes that a "Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."[25]

Most defenders of activist judicial review accept the legitimacy of the conservatives' attack and explicitly admit that nonoriginalist judicial review only can be justified if it can be reconciled with majority rule. For example, Daniel Conkle begins his article that seeks to justify nonoriginalist review by observing that "the ultimate validity of any theory of judicial review depends on reconciling such review with the principle of majoritarian consent."[26] Similarly, Perry, at the outset of his widely reviewed book, writes:

> [M]y strategy is not to reject the principle [that decisions in a democracy be subject to control by electorally accountable officials], but, on the contrary, to accept it as a given and then to defend judicial review—in particular, constitutional policymaking—as not inconsistent with the principle.[27]

Thus, the current debate centers around a syllogism advanced by the critics of judicial review. The critics' argument can be summarized as the following deduction:

*Major premise*: All value decisions in a democracy must be subject to control by electorally accountable officials in order to be legitimate.

*Minor premise*: Nonoriginalist judicial decisions are value choices made by an institution that is not subject to control by electorally accountable officials.

*Conclusion*: Therefore, nonoriginalist judicial decisions are illegitimate.

The defenders of nonoriginalist judicial review do not challenge the critics' major premise. Instead, they respond at the level of the minor premise, trying to rescue judicial review by developing a model of court action that does not involve impermissible judicial value imposition. For example, Ely argues that judicial review that attempts to make the political process work by reinforcing representational values is consistent with democracy and does not violate the major premise.[28] Perry argues that under his approach nonoriginalist review by the Supreme Court does not violate the major premise because Congress has the authority to restrict the Supreme Court's jurisdiction.[29] As such, the entire debate focuses on whether it is possible to deny the minor premise of the syllogism and develop a model of judicial review that is consistent with a requirement that all decisions be controllable by electorally accountable officials.

## THE MISGUIDED CURRENT DEBATE

The current debate is misdirected, first, because its major premise is based on an unjustified and incorrect definition of democracy, in purely procedural terms, as majority rule. Thus, the defenders of judicial review have committed a crucial error in conceding the major premise of the syllogism. Second, if the major premise is true, then all judicial review, originalist and nonoriginalist, is illegitimate because it all involves decisions by an unelected judiciary displacing choices of elected officials. Therefore, either all judicial review is illegitimate or the major premise is false. Finally, the current debate is misdirected because it fails to provide any method for constitutional interpretation. The debate has focused entirely on the role of the judiciary, which obscures the real question of how meaning should be given to the Constitution. In fact, the role of the judiciary only can be decided in the context of the larger inquiry.

I emphasize that I am not arguing that majority rule is unimportant nor denying that it is one component of a correct definition of democracy. Instead, the analysis which follows establishes that it is wrong to define democracy solely as majority rule, and incorrect to begin with the premise that judicial review must be reconciled with democracy defined in purely procedural terms.

### The Syllogism's Major Premise Is False: Democracy Does Not Require That All Decisions Be Subject to Control by Electorally Accountable Officials

As described above, the current debate begins with the premise that society's commitment to democratic government requires that decisions be subject to control by electorally accountable officials. It is important to recognize that this premise is postulated entirely as an axiom. No attempt has been made by any of the commentators to develop a political or moral theory defending this definition of democracy. Perry, for example, writes: "I accept as a given [the principle that] . . . policymaking must be electorally accountable. . . . The principle of electorally accountable policymaking is axiomatic."[30] Perry, although perhaps more explicit than many scholars, is typical in that he simply posits, without any defense, the major premise that decisions in a democracy must be subject to control by majoritarian processes.

In fact, none of the commentators makes any attempt to define what they mean by "electorally accountable policy-making." At what point can a government official be regarded as electorally accountable? How frequent must the elections be in order for an official to be regarded as truly electorally accountable? Are senators sufficiently electorally accountable despite their six-year terms? Is a lame-duck president an electorally accountable official? How indirect might the control be for the officials to still be regarded as electorally accountable? Are members of the president's Cabinet to be deemed electorally accountable? What degree of control by electorally accountable officials is sufficient? Is the possibility of a constitutional amendment to overturn a Supreme Court decision sufficient to make the judiciary an institution that is subject to electoral control? Is the power of the executive to disregard and refuse to implement judicial decisions enough to create control by an electorally accountable institution?

At the very least, there is no basis for an axiomatic definition of democracy. Political scientists offer many alternative definitions and conceptions of democracy. No one can claim authoritative status as the only proper or legitimate definition. Political scientist Martin Edelman writes:

> There is considerable disagreement about what democracy means and implies. . . . Too often proponents of democracy defend their position on the comforting, though erroneous, assumption that it represents *the* American political theory. . . . Neither the Constitution nor the development of American political thought can serve as an authoritative basis for any theory of democracy.[31]

In fact, if any definition of democracy can claim axiomatic status, it clearly is not a definition of democracy as majority rule. A definition can be justified in two possible ways. One is descriptive—that the definition correctly describes the U.S. system of government. The alternative is to argue normatively that regardless of what exists the definition describes what should be the system. Descrip-

tively, it is incorrect to define democracy as a commitment that all decisions be made by majority rule, and normatively, a purely procedural conception of democracy as majority rule is not desirable.

U.S. government cannot be described as dedicated to always maximizing the preferences of the majority. For example, society is committed to protecting many substantive values that it is unwilling to allow the majority to violate or ignore. Society will not allow the legislature to torture or persecute minorities, no matter how much pleasure the majority might derive from such behavior. Similarly, society is committed to protecting free exercise of religion and freedom of speech, even if it means ignoring the majority's preference for suppression. As Justice Robert Jackson explained in *West Virginia Board of Education v. Barnette*:

> One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[32]

Society in the United States is as much committed to certain substantive values as it is committed to the importance of majority rule. These few examples of important substantive values reveal the inadequacy of the purely procedural definition of democracy as majority rule that underlies the debate over the legitimacy of judicial review. In fact, if one looks up *democracy* in *Webster's*, the first definition listed is: "a state of society characterized by tolerance to minorities, freedom of expression and respect for the essential dignity of the human individual, with equal opportunity for each to develop freely to his fullest capacity."[33] The justifications for democracy developed by many political scientists emphasize its desirability as a system of government that best protects basic liberties and most ensures equality.[34]

Furthermore, a description of democracy as majority rule is not what the Framers of the Constitution intended. The Framers feared tyranny by the majority and explicitly rejected a system of government of unchecked majority control. Hannah Arendt observes that the "Founding Fathers tended to equate rule based on public opinion with tyranny; democracy in this sense was to them but a new fangled form of despotism."[35] The records of the Constitutional Convention are filled with statements, such as that of Elbridge Gerry, expressing a need to avoid the "excess of democracy."[36] James Madison, who is regarded as particularly influential in the drafting and ratification of the Constitution, was especially distrustful of majorities and wanted to create what he termed a "republic," not a purely majoritarian democracy.[37] Robert Dahl explains:

> Madison, in particular, wished to erect a political system that would guarantee the liberties of certain minorities whose advantages of status, power, and wealth would, he thought, probably not be tolerated indefinitely by a constitutionally untrammeled majority.[38]

The fact that the Framers of the Constitution did not want to create a government based entirely on majority rule is important because originalists are committed to interpreting the Constitution in accord with the Framers' intent.

Therefore, the originalists' own methodology compels them to abandon their purely procedural definition of democracy as majority rule.

Perhaps the clearest illustration of the inaccuracy of a purely procedural definition of democracy is the actual manner in which U.S. government is structured and functions. In countless ways, government activity and structure does not reflect a definition of democracy as majority rule and electorally accountable policy-making. For example, because all states have two senators regardless of their population, senators representing states with much less than half the population can enact laws, and senators representing a substantial majority of the population are often powerless to act.[39] A minority of senators has the power to block the ratification of treaties and the appointment of public officials, like judges and ambassadors. A bill favored by a majority of the people and a majority of Congress might be defeated by a filibuster or vetoed by the president. In fact, the United States Senate was originally intended to represent states and not citizens. Senators were not made electorally accountable until 1913, when popular election of senators replaced selection by state legislatures.

Nor does a purely majoritarian conception of democracy describe the executive branch of government. A second-term president cannot run for reelection because of the Twenty-second Amendment to the Constitution. A lame-duck president is not an electorally accountable official or subject to electoral control. Even the selection of the president through the electoral college is antimajoritarian. A minority of the population, as little as 25 percent, has the power to elect a president because electors are not allocated entirely on the basis of population, and because states must cast all their electoral votes for one candidate. Moreover, there are many key executive officials who are not electorally accountable. Members of the Cabinet, and especially members of independent regulatory agencies whom the president cannot easily remove, are unelected and only indirectly accountable to the people.

Perhaps the clearest example of the inaccuracy of describing democracy in the United States in procedural terms is the power of the judiciary. Since *Marbury v. Madison* in 1803, the Supreme Court has had the power to invalidate legislative acts.[40] From the earliest days of the Republic, the Court has used a nonoriginalist mode of review in protecting rights not stated or implied in the Constitution.[41] This fact is important because it reveals that U.S. society has never required that all decisions be made by electorally accountable officials.

Finally, the very existence of a Constitution refutes a description of democracy as completely majoritarian. The Constitution identifies some matters—the structure of government and certain core values—that the majority cannot change except through an elaborate amendment process. All government officials take an oath of office to uphold the Constitution, which means that in certain instances they must disregard the preferences of the majority in order to comply with the Constitution.[42]

In sum, a definition of democracy as majority rule, as a commitment that all decisions be subject to control by electorally accountable officials, cannot be

defended on the grounds that it accurately describes the system of government in the United States. Our government combines majoritarian and nonmajoritarian features. Protecting freedom of speech and upholding the rights of minorities are as much a part of U.S. democracy as are regular elections to ensure political accountability.

Alternatively, the major premise of the current debate—that decisions in a democracy must be made by electorally accountable officials—might be defended normatively. That is, it could be argued that regardless of the system that currently exists, majorities should be able to control all government decisions. Of course, this would mean that the definition of democracy as majority rule could not be stated as an axiom; it would need to be defended by a normative theory. No such theory has yet been offered in the debate.[43]

Moreover, it is unlikely that such a theory will be persuasive or accepted. At the most basic level, always maximizing the majority's short-term preferences should be deemed unacceptable because some things—the treatment of minorities and fundamental rights—should be protected from majority rule. As will be explained in more detail in Chapter 2, it is desirable for society to limit the majority's ability to discriminate against minorities or to violate basic human and political rights. The Constitution should be regarded as an antimajoritarian document that accomplishes exactly this result of insulating some matters from majoritarian control. As such, it is hardly objectionable that judicial review enforcing an antimajoritarian document is also antimajoritarian.

Furthermore, even superficial inquiries into political and moral theory reveal the normative bankruptcy of a purely procedural definition of democracy. In evaluating the proper normative definition of democracy, it is necessary to ask the basic question, Why is democracy a desirable system of government? While an answer to this question is complex and beyond the scope of this discussion, an examination of the question is revealing. Democracy might be defended because of its intrinsic value, that is, the intrinsic value that exists in allowing citizens to participate in government. Democratic also is likely to be defended in instrumental terms as best promoting certain accepted values. For example, Henry Mayo's classic work *An Introduction to Democratic Theory* identifies a number of reasons why democracy is desirable.[44] Mayo notes the ability of democracy to resolve disputes peacefully and to promote the noncoercive exercise of government authority, its ability to preserve individual autonomy and liberty, and its ability to maximize equality and justice.[45] Many other scholars defend democracy in similar instrumental terms as advancing values that are almost universally accepted in U.S. society.[46]

This literature reveals a key flaw in the current debate over judicial review. If democracy is desirable because it advances certain values, then the proper definition of democracy is the one that best maximizes the selected goals. Defining democracy in purely majoritarian terms provides minimal protection of these values because the majority would be allowed to trample the central values. For example, if democracy is preferred because it maximizes liberty, then pure

majority rule that risks substantial deprivation of important liberties is not the correct definition of democracy. The proper definition must include substantive values. Less abstractly, if democracy is defended in instrumental terms of maximizing certain values, then judicial review that safeguards those values enhances democracy. In other words, judicial review may be antimajoritarian, but it is not a deviant institution.[47] To the contrary, it can be defended as an excellent means for protecting precisely the values that democracy is designed to further.

The current debate is flawed because it gives majority rule precedence over all other values. Judicial review has been viewed as a means that must be reconciled with the ultimate end of electorally accountable policy-making.[48] But if it is accepted that democracy, and even majority rule, are in large part instrumental as means to other ends, then judicial review is appropriate because it helps to achieve those goals. If democracy is a desirable system of government because it best ensures equality and promotes individual autonomy, then judicial review is an important feature of such a system because it helps to achieve these ultimate ends.

An alternative normative inquiry into the meaning of U.S. democracy is to ask why the values embodied in the Constitution are worth caring about. Moral and political theorists have developed sophisticated justifications for why equality is important,[49] why individual rights should be protected,[50] why the government should be structured with a separation of powers.[51] My task is not to repeat these arguments. Rather the point is that society values many things in addition to majority rule. To focus exclusively on reconciling judicial review with majority rule is to forget other core values and especially to ignore the Court's ability to advance and protect other basic values. The arguments advanced for equality, and rights, and separation of powers are arguments for why democracy normatively should be defined as more than "majority rule."[52]

It might be argued that the term democracy should be limited to meaning majority rule, and the other values should be included as part of an overall definition of good government.[53] But even then my point remains valid: it is incorrect to focus solely on majority rule in evaluating judicial review because there are other values which must be taken into account.

Moreover, these other substantive values are and should be part of the definition of democracy. As explained above constitutional scholars begin with the premise that judicial review must be reconciled with democracy.[54] Democracy is accepted as the core concept of the governmental system. If democracy is defined solely as majority rule, then the concept of majority rule will have unjustified psychological and rhetorical primacy over other important values. The best approach is to adopt a much richer definition of democracy, one that includes the core governing values which political and moral theorists have justified.[55] Majority rule is one of these, but not the only one.

What all this establishes is that democracy cannot be defined, descriptively or normatively, in purely procedural terms as requiring that all decisions be subject to control by electorally accountable officials. This conclusion has enormous implications for the debate over judicial review. First, it reveals that the major

premise of the debate is incorrect: majority rule is not the exclusive guiding principle for U.S. government. Judicial review therefore cannot be criticized simply because it is antimajoritarian; and the whole notion of the "counter-majoritarian difficulty" is based on an incorrect definition of U.S. government. As such, it is misguided and unnecessary to focus on how to reconcile judicial review with majority rule. Although majority rule is valued, so is the antimajoritarianism inherent in the existence of a constitution and judicial review. The values inescapably conflict, and it is wrong to say that the latter is inappropriate unless it achieves the former, majority rule.

Second, the rhetorical force of the attack on activist judicial review is derived from the claim that it is undemocratic. It is hard to imagine a more damning criticism of a practice in our society than the accusation that it is antidemocratic. The charge itself creates a presumption against the practice. The originalists' attack on judicial review employs this attack by claiming that all noninterpretive review is antidemocratic and invalid. Defenders of judicial review unfortunately fell for this ploy and have devoted their efforts to the task of reconciling judicial review with majority rule. Once it is demonstrated that democracy is not synonymous with majority rule, and judicial review is not per se antidemocratic, the rhetorical force of the criticism is removed.

Finally, this discussion has demonstrated the importance of including substantive values in the definition of democracy. Judicial review enhances democracy because it is a vehicle for maximizing protection of those substantive values. Although no attempt has been made to define democracy, it is clear that any accurate and desirable definition must include substantive as well as procedural values. It is incorrect to define democracy so that it is synonymous with majority rule or a requirement that all decisions be subject to control by electorally accountable officials. U.S. democracy includes regular elections to ensure government accountability, but it is also includes protecting cherished values, such as speech, association, and privacy, and safeguarding minorities. In short, the current debate is fundamentally misdirected because it begins with a premise that is unjustified and unjustifiable.

### The Attack on Judicial Review Is Disingenuous: All Judicial Review Is Antimajoritarian

If the major premise of the syllogism is true, and all decisions in a democracy must be subject to control by electorally accountable institutions and individuals, then *all* judicial review, originalist or nonoriginalist, is illegitimate. All judicial review involves unelected judges invalidating the actions of electorally accountable officials. This means that attackers of judicial review must either argue for the elimination of all judicial review or abandon the major premise of their argument.

I contend, therefore, that no theory can reconcile judicial review with majority rule. To establish this conclusion, first, I will examine those theories that purport to achieve such a reconciliation. After demonstrating their failure to define a

model of judicial review that is consistent with complete majority rule, I will argue that even originalist review is inconsistent with majority rule. The conclusion that emerges is that all judicial review is antimajoritarian, so that it is hypocritical and disingenuous to single out any particular method and criticize it for being *antidemocratic* (in the sense in which the critics use that term).

### *The Defenders of Judicial Review Fail to Reconcile Judicial Review and Majority Rule*

If democracy requires that values be chosen by electorally accountable officials, judicial review by unelected judges cannot be reconciled with a purely procedural definition of democracy. Either the commitment to majority rule or the commitment to judicial limits on majoritarian decisions must be sacrificed. The theories of Michael Perry and John Hart Ely—probably the two most prominent and widely discussed current theorists who attempt to reconcile nonoriginalist judicial review with democracy—demonstrate this conclusion. Neither scholar's theory succeeds in preserving both majority rule and activist judicial review.

Consider first Perry's defense of nonoriginalist review. Perry argues that nonoriginalist review is essential to elaborate and enforce individual rights that were not constitutionalized by the Framers and to protect these rights from government interference.[56] He contends that the "function of non-interpretive review in human rights cases is prophetic"; it should "advance moral evolution" by creating a dialogue that is directed toward finding correct moral and political values.[57] Although Perry advances persuasive reasons in support of nonoriginalist review, these reasons only demonstrate why majority rule is not completely trustworthy. Perry's arguments in favor of nonoriginalist review do not reconcile judicial review with majority rule.

So how does Perry attempt to make nonoriginalism consistent with his definition of democracy? He says that "the legislative power of Congress . . . to define, and therefore to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of lower federal courts" preserves majority rule.[58] Congress, a democratic body, can control the courts through the power to restrict federal court jurisdiction and thus can preserve both judicial review and democratic principles. This undoubtedly is the heart of Perry's theory; he admits that "if in fact Congress did lack such a power, I would not know how to defend noninterpretive review in terms consistent with the principle of electorally accountable policymaking."[59]

Perry's theory fails to achieve his goal of ensuring both majority rule and nonoriginalist judicial review. He is caught by the same dilemma that he tries to resolve: either restrictions on federal court jurisdiction do not overturn or otherwise effectively stymie Supreme Court decisions—in which case, majority rule is lost—or these limits on jurisdiction do have the effect of reversing the Court's policy choices—in which case, noninterpretive judicial review is sacrificed.

Consider the first possibility, that Supreme Court decisions would remain valid constitutional law despite subsequent exercise of the congressional power

to limit federal court jurisdiction. Restricting court jurisdiction does not, by itself, overrule prior judicial decisions.[60] For example, an act of Congress that prevents federal courts from hearing cases that involve abortion[61] or school prayer[62] would not alter Supreme Court precedents that create a right to abortion or ban school prayers. The Supreme Court's decisions would remain the law, and both Congress and the states would be obligated to uphold them.[63] Instead of reversing prior Court decisions, restrictions on federal court jurisdiction would freeze these decisions because the Court would have no opportunity to modify its earlier holdings.[64] As a result, the Court's antimajoritarian decisions would remain unchanged, and restrictions on jurisdiction would not protect majority rule.

The second possibility is that Congress and the states might ignore Supreme Court precedents in areas from which jurisdiction subsequently had been withdrawn, in which case majority rule would be preserved at the expense of judicial review. If Congress could overturn precedents by limiting jurisdiction, the Court's decisions would survive only as long as a majority of Congress agreed with them.[65] Judicial review as a check on majoritarian tyranny is illusory if the majority can overrule Supreme Court decisions any time that it wishes.

Most commentators, including Perry, recognize that the probable consequence of limiting federal court review would be widespread disregard of earlier decisions,[67] especially because the purpose of jurisdictional restrictions is to change the law substantively.[68] To allow such legislation would effectively overturn specific Supreme Court decisions. It would, in fact, subvert the entire constitutional structure.[69] Congress would have the power to enact unconstitutional laws, for example, that prohibit abortion or that permit school prayer, and could exempt these laws from federal court review. In effect, this power would overrule *Marbury v. Madison*[70] because the judiciary would no longer be able to rule on the constitutionality of federal statutes if Congress wanted to prevent such review. Similarly, the core constitutional concept of federal supremacy would be lost, because state courts, with Congress's permission, could disregard Supreme Court decisions. If Congress were to restrict the Supreme Court's jurisdiction, states could ignore Supreme Court precedents with impunity and make state law supreme over federal. The Supreme Court could no longer ensure state compliance with the Constitution in those areas in which Congress had restricted federal court jurisdiction. The notion of a national constitution with uniform meaning throughout the country would be lost.[71]

Perry might respond that these criticisms are overstated because he would not allow Congress to proscribe originalist judicial review.[72] The theory advanced in his book only permits Congress to restrict jurisdiction in nonoriginalist areas, where the Constitution is silent. For a number of reasons, this distinction does not answer the criticisms. First, Perry concedes that almost every major Supreme Court decision in the past 30 years has been nonoriginalist and therefore within Congress's power, in effect, to overrule.[73] Because very few of the Court's constitutional decisions are originalist, the fact that Congress could not reverse originalist decisions hardly protects judicial review. If nonoriginalist

review is essential, as Perry claims, it is unsatisfactory to allow it to exist at the sufferance of Congress.

Second, if Congress can assert majority rule to limit nonoriginalist review, why cannot Congress assert the same definition of democracy to limit originalist decisions? Perry says that Congress may restrict the Court's jurisdiction in areas where nonoriginalism is followed. If, however, majority rule is the dominant value, Congress should have the power to limit the Court across the board. Article III's "exceptions clause," which arguably authorizes restrictions on jurisdiction, does not distinguish between originalist and nonoriginalist review.[74]

Third, even if one assumes the validity of Perry's point that Congress can limit only nonoriginalist review, the distinction between originalist and nonoriginalist decisions is hardly clear. The Court could circumvent jurisdictional limits by labeling its decisions *originalist*, and Congress could impose restrictions by terming the areas *nonoriginalist*.[75] Constant tension between these branches of the federal government would result. As Lawrence Sager observes, even if a "majoritarian check on the Court would be desirable, it must still be recognized that the control of jurisdiction by Congress is an utterly wretched device to serve that end."[76]

In response to these criticisms of his approach to reconciling judicial review and majority rule, Perry might argue that Congress would rarely, if ever, use its power to restrict federal court jurisdiction.[77] This misses a key point: If Congress does not use its power to restrict jurisdiction, then there is no majoritarian control over the judiciary. Moreover, in light of the numerous bills now pending in Congress to restrict federal court jurisdiction, it is not at all certain that such laws will not be enacted.[78] In fact, thus far the "scholarly consensus" that such restrictions on jurisdiction are unconstitutional has been a "political force [keeping] . . . Congress from enacting such legislation."[79] If theories such as Perry's are accepted, they may increase the likelihood that laws restricting jurisdiction will be enacted.

My goal has not been to prove that it is unconstitutional for Congress to limit federal court jurisdiction as a means of changing the substantive law. There already exists ample literature detailing many reasons why such restrictions on jurisdiction are unconstitutional.[80] Rather, my point is that regardless of their constitutionality, restrictions on federal court jurisdiction cannot reconcile judicial review with majority rule. Either precedents will be followed—in which case, majority rule is thwarted—or the decisions will be ignored—in which case, judicial review as a check on majority tyranny is lost.

Consider next Ely's attempt to devise a model of judicial review that does not violate the major premise of the syllogism, that is, that allows popularly elected officials to make all value decisions. Unlike Perry, whose theory attempts to reconcile all nonoriginal judicial review with majority rule, Ely argues that only one type of nonoriginalist review is permissible. Ely argues for what he terms a "participation-oriented, representation reinforcing approach."[81] He concedes the major premise of the syllogism, admitting that the Court usurps democratic rule if it imposes substantive values, but he contends that his theory allows the

Court to avoid making such value choices.[82] Under Ely's approach, the sole purpose of constitutional review is to create a fair process, either by providing "procedural fairness in the resolution of individual disputes" or by "ensuring broad participation in the processes and distributions of government."[83] Ely maintains that because his theory allows the Court to avoid making value choices, it "is not inconsistent with, but on the contrary (and quite by design) entirely supportive of, the underlying premises of the American representative democracy."[84]

Ely, like Perry, is trapped by the very dilemma that he tries to resolve: he cannot have both judicial review and a definition of democracy as majority rule. Under Ely's theory, the Court either will impose substantive values—in which case, majority rule is lost—or will defer to legislative policy choices—in which case, judicial review is meaningless. To demonstrate this dilemma, it is useful to consider how specific constitutional provisions are treated under Ely's theory.

First, how would Ely's approach deal with the numerous constitutional provisions protecting substantive rights? For example, the Constitution prevents impairment of the obligations of contracts, protects the free exercise of religion, prohibits the government from establishing religion, bans the taking of private property without just compensation, and prohibits cruel and unusual punishment. These constitutional provisions do not concern the process of government, as Ely defines it,[85] but rather constitute clearly substantive rights that the Constitution prevents government from infringing upon.[86] These constitutional rights present Ely with a dilemma. He can contend that the Court should refuse to enforce these provisions because none of them relate to the process of government—in which case, judicial review of key constitutional provisions is lost—or he can allow the Court to interpret the meaning of these provisions—in which case, majority rule is denied as courts overturn legislative decisions to protect these rights.

Ely seems to choose the latter alternative, for in a number of places, he demonstrates how his process-based theory protects substantive values, such as the right to travel.[87] Yet this seems to be exactly the kind of antimajoritarian value imposition that Ely opposes. In protecting the right to interstate travel, the Court would strike down legislation on the basis of a right not mentioned in the Constitution.[88] The Court's imposition of values is the same under Ely's theory as it is under the nonoriginalist model; only the justification differs.

Moreover, under Ely's expansive definition of process, virtually every constitutional issue can be phrased in procedural terms that justify judicial review. For example, even the decision that the state cannot restrict a woman's right to an abortion[89]—viewed by Ely as the height of judicial value imposition[90]—can be justified under a process-oriented model. Applying Ely's definition of equal protection,[91] the Court could find that laws that prohibit abortion deny to a minority, the poor, a service available to the majority who can afford to travel to states or countries where abortion is legal.[92] Pressure from vocal special-interest groups blocks the democratic process and necessitates court action to ensure protection of the minority. Although this argument may not be the strongest case

for legalized abortions, it illustrates how the Court can cast almost any decision in procedural terms.[93]

Second, even in dealing with those constitutional provisions that are process based, Ely does not avoid the need for the Court to make substantive value judgments. If the Court defines what is a fair process, policies enacted by majoritarian institutions are overruled; if the Court must defer to legislative determinations of fairness, judicial review is nonexistent. Ely chooses the first alternative. He permits the judiciary to determine what is a fair process.[94] But it is impossible for the Court to decide what is "fair" or "just" representation without making substantive value judgments.[95] For example, at what point is malapportionment of state legislatures so egregious that it is unconstitutional?[96] There is no way to decide this issue without a substantive theory of democracy;[97] thus, the Court inevitably must substitute its judgment for that of the popularly elected legislature.

Furthermore, in deciding whether an adjudicatory process is fair, the Court must make the same choices that it would under the nonoriginalist approach. For instance, deciding whether the Fifth Amendment mandates free counsel for criminal defendants[98] or whether suspects in criminal investigations should be given *Miranda* warnings[99] requires the Court to define and balance individual rights against society's interest in apprehending criminals. Ely's definition of democracy demands that politically accountable legislatures perform such balancing. Nonetheless, Ely states that under his process-oriented model the Court would decide these issues because they relate to the fairness of the criminal process.[100] What criteria would the Court use in choosing which values have priority? As Ely offers no alternative to the justices' using their own values, ultimately his approach is no different from the nonoriginalist methods that he criticizes.

Ely contends that his theory is consistent with democracy even though judges overrule the majority's policy choices because democracy requires proper representation and fair processes.[101] This argument, however, reveals a shift in his definition of democracy. If democracy is defined in procedural terms as a requirement that value choices be made by electorally accountable officials, then judicial reversals of legislative decisions are inconsistent with majority rule, regardless of the content of the Court's decisions. To justify allowing judicial review to create a fair process, Ely must adopt a definition of democracy that includes substantive values such as fair representation and just adjudication. While this latter definition may be preferable, it is different from the definition of democracy as majority rule that Ely begins with and that he seeks to reconcile with judicial review. Although the content of the Supreme Court's decisions may further the representation of all in society, "the *process* of judicial review is not democratic because the Court is not a politically accountable institution."[102] Thus, even judicial review that is "representation-reinforcing" inevitably involves judges using their values to displace legislative decisions.

Finally, consider Ely's theory in relation to the equal protection clause of the

Fourteenth Amendment. An unequivocal commitment to majority rule requires acceptance of the reality that majorities frequently persecute minorities. Judicial protection of minorities is inherently antimajoritarian because the Court is thwarting the will of popularly elected legislatures.[103] While Ely is certainly correct that protecting minorities is indeed a crucial function of the Court, its desirability does not make it democratic. Again, unless democracy is redefined to include a substantive value—here equality—judicial protection of minorities is inconsistent with democracy.[104]

Furthermore, the Court must make substantive value judgments in determining what is equal.[105] Deciding what people are alike and deserve to be treated alike requires some substantive basis for comparison. For example, Ely argues that laws discriminating against blacks are invalid because they are based on "prejudice," but those prohibiting homosexuality might be justified because they are based on "moral judgments."[106] However, all who are discriminated against, including homosexuals, claim that the basis for their persecution is prejudice, and all who discriminate claim a moral basis for their actions.[107] In sum, any judicial review under the equal protection clause is inconsistent with the premise that requires that all decisions be made by majority rule.

The conclusion is not that the justices should ignore participational values. Ely persuasively argues that these are among the most important values that the Court protects. But Ely's theory fails to reconcile nonoriginalist review with his definition of democracy because the Court still overturns the decisions of popularly elected officials based on its own substantive value judgments.

Ely and Perry are not alone in their failure to accommodate both majority rule and nonoriginalism.[108] If democracy is defined as requiring that all value choices be subject to control by electorally accountable officials, no theory can ever justify nonoriginalism.[109] The question is formulated in a way that makes an answer logically impossible: a requirement that all policy decisions be made by majority rule precludes unelected judges from ever making value choices.

Conservative critics rejoice in this conclusion, contending that it establishes (assuming the truth of their major premise) the illegitimacy of nonoriginalism. However, if one examines originalism, it is clear that it is every bit as antimajoritarian as nonoriginalism.

### *Originalist Judicial Review Is Inconsistent with a Requirement That Decisions in a Democracy Be Subject to Control by Electorally Accountable Officials*

Originalists claim that originalist judicial review is legitimate in a democracy but that the Court usurps democratic rule when it decides cases based on norms not stated or implied in the written Constitution.[110] But why is not all judicial review, including originalist review, improper, as it all involves unelected judges overturning policies enacted by electorally accountable officials? Why is the necessary and logical implication of the originalists' argument never drawn,

that *Marbury v. Madison*[111] should be overruled and that the majority, through popularly elected legislatures, should have the final say on the meaning of the Constitution?

Originalists try to answer this question by invoking the distinction between originalism and nonoriginalism. They claim that an originalist methodology merely applies the Constitution's values, whereas a nonoriginalist one requires that unelected judges impose their own values. Of course, this argument is problematic because all decision making, including originalism, allows discretion and involves judicial value imposition. History is inevitably ambiguous, requiring judges to make value judgments in interpreting the historical record.[112] Furthermore, because formalism is impossible, value judgments inevitably arise in applying the law to new situations.[113] Although originalism often involves less judicial value imposition, it is incorrect to pretend that any model of judicial decision making can be so formalistic as to end all judicial discretion.

Even assuming, however, that originalism could somehow avoid judicial value judgments, judicial review still is not democratic because any ruling overturning decisions by popularly elected officials is, by definition, undemocratic. Although the Court may follow the Constitution, it still thwarts majority will and therefore is illegitimate by the originalists' definition of democracy whenever it strikes down legislative or executive policies.

Originalists may answer that the Framers of the Constitution intended that their choices be followed and thus that the Court is obligated to do so.[114] This claim is premised on highly questionable history and logic. As Alexander Bickel observed, the "authority to determine the meaning and application of a written Constitution is nowhere defined or even mentioned in the document itself."[115] There is great dispute about whether the Framers intended judicial review,[116] and there is no historical basis for concluding that the Framers intended to constitutionalize any particular theory or interpretation.[117] Furthermore, it is circular to say that because the Framers intended that we follow their intent, we are obligated to do so.[118] There must be some substantive theory explaining why it is appropriate to interpret the Constitution according to the Framers' intent.[119]

More important, even if the Framers intended that the Court adhere to the Framers' expectations, and even if this obligates it to do so, judicial review is still antimajoritarian. Judges applying the Framers' intent are striking down statutes enacted by popularly elected legislatures, based on the desires of men who lived two centuries ago. If originalists criticize activist judicial review for being rule by nine "Platonic guardians,"[120] is not following the Framer's intent rule by a small group of long-dead guardians? Furthermore, why should we believe that the Framers, a group of white landowning males who were not representative of their society, better reflect current majority wishes than does the United States Supreme Court?[121] The point is a simple one: Judicial review is antimajoritarian even if it strictly adheres to intended constitutional norms.

Originalists often answer that originalist judicial review is democratic because the people consented to the adoption of the Constitution.[122] First, factually it is wrong to say that the people ever consented to the Constitution because less than

5 percent of the population participated in the ratification process.[123] More important, it is erroneous to say that since the people ratified the Constitution, originalist review is democratic, because not a person alive today—and not even most of our ancestors—voted in its favor.[124] Democracy is defined by originalists to require decisions by *current* majorities;[125] majority rule does not exist if society is governed by decisions of past majorities that cannot be overruled by a majority of the current population.[126]

Originalists try to circumvent this argument by contending that the failure of subsequent generations to change the Constitution indicates an implicit consent to its authority.[127] In other words, by tacitly consenting to the Constitution, we agree to be ruled by it; thus, its originalist application is democratic. This argument assumes that a failure to amend the Constitution indicates contemporary majority approval of the document. Even, however, if a majority opposed a constitutional provision, that majority could not change the Constitution unless the reform were favored by the supermajority necessary to enact a constitutional amendment (two thirds of both houses of Congress and three quarters of the state legislatures). Thus, the absence of a constitutional amendment does not mean that a majority supports the document as it stands.

More important, by arguing that the absence of amendment reflects consent of the majority, originalists concede the legitimacy of all nonoriginalist judicial review. If the failure to amend the Constitution constitutes democratic consent, then the failure to overrule nonoriginalist Supreme Court decisions by constitutional amendment implies consent to those decisions.[128] The originalist argument that consent based on silence accords with democratic principles forfeits the entire debate to the nonoriginalists because this analysis indicates that there has been social approval of all Supreme Court decisions except the few that have been overruled by constitutional amendment.[129]

Ultimately, the originalists' argument cannot be defended without a clearer definition of the meaning of democracy and majority rule. The underlying question is whether democracy permits current majorities to bind and limit future majorities. Can a society committed to democratic principles but fearing ill-advised decisions reflecting the passions of the moment constrain its ability to change certain policies in the future? Can a society desiring to enshrine basic values make it more difficult for future majorities to overrule them? Such limits on decision making are inconsistent with a simple definition of majority rule. Unless originalists refine their definition of majority rule to allow such constraints, it is impossible for them to account for the existence of the Constitution, much less develop a theory for its interpretation.

Thus, all judicial review, originalist and nonoriginalist, violates the premise that decisions in a democracy must be made by majority rule through electorally accountable officials. This conclusion has major implications for the debate over the legitimacy of judicial review. Now originalists must either argue that all judicial review should be eliminated and *Marbury v. Madison*[130] overturned, or claim that some types of judicial review are so important that they justify sacrificing the principle of majority rule. If the critics argue the former, the

debate shifts completely and becomes a dispute over whether constitutional judicial review is ever desirable. Presumption in such a debate will rest with those who are defending a practice that has existed for almost 200 years. Instead of attackers of judicial review having the rhetorical initiative by claiming that Court decisions are inconsistent with democracy, now they must make a normative argument as to why all judicial review is inappropriate and why *Marbury v. Madison* should be overruled.

Alternatively, originalists can argue that some types of Court decisions are so important that they justify sacrificing majority rule. Again, notice how the debate shifts. The appropriate question then becomes, What values are so important that the Court should protect them from social majorities? This is a question of crucial importance and is exactly what should be debated. Notice, however, that by agreeing that some values are so fundamental as to justify judicial overruling of majoritarian decisions, the attackers of judicial review are forced to abandon their major premise. No longer can they claim that all decisions in a democracy are illegitimate unless made by electorally accountable officials because they have admitted that some decisions should be made by the Court.

In other words, by demonstrating that all judicial review is inconsistent with a requirement for decisions by electorally accountable policymakers, critics of judicial review are compelled either to attack all judicial review or to abandon their major premise. Either move enormously helps the defenders of judicial review and radically changes the nature of the debate.

The critics of judicial review have not tried to argue that all judicial review should be eliminated. Instead, they have tried the latter approach, contending that originalist judicial review is necessary to uphold the Constitution. They explain that the Constitution should be followed and compliance with the document necessitates judicial review.[131] Of course, the questions then become: Why not trust the legislature to preserve the Constitution? Why allow antimajoritarian review? Moreover, if majority rule is the highest value in a democracy, why should a legislature feel bound to the Constitution at all? Shouldn't it be able to follow the wishes of the majority? The originalist argues at this point that the Constitution is so important that the majority should not be able to disregard it.

This argument does not reconcile originalist judicial review with majority rule. To the contrary, it rests on the premise that the Constitution is more important than majority rule. This argument for judicial review is a functional one, based on the need to protect certain values from majoritarian decisions. Simply put, originalist review is supported not because it is consistent with majority rule, which it obviously is not, but because constitutional government is deemed more important than majority rule.

But if originalists are willing to sacrifice majority rule, are they not disingenuous in criticizing nonoriginalists for being antimajoritarian? As all judicial review is antimajoritarian, to argue against particular models based on majoritarian principles is pointless. If a functional justification can support originalist

review, the only question is whether there is an equally compelling functional justification for nonoriginalist review. In fact, the functional justification for nonoriginalist review is identical to a primary reason offered for originalist review: the need to protect certain crucial values from majoritarian decision making.

In other words, once we agree that constitutional values are more important than majority rule, we abandon the major premise of the current debate, and the question becomes, Which values should be protected from the majority? The concept of majority rule obviously provides no answer to this question and supplies no reason to prefer originalist values over nonoriginalist ones.

Thus, demonstrating that all judicial review is antimajoritarian is important because it establishes that the major premise of the current debate is incorrect, that the focus on majority rule is misguided, and that what we really should be arguing about is which values should be constitutionally protected.

### The Current Debate Fails To Provide a Method For Constitutional Interpretation

The current debate is misguided because it focuses entirely on the role of the judiciary and it derives the appropriate method of constitutional interpretation from the definition of the judicial role. This approach is completely backward: the method of judicial review should be a function of the chosen method of constitutional interpretation, not the reverse.

Originalists have concentrated on attacking the legitimacy of specific nonoriginalist Court decisions. Their focus has been on limiting judicial review by contending that the Court should protect only values clearly stated in the Constitution or intended by its Framers. Originalists argue that the judiciary may not act unless there is a clear indication of an original intent to constitutionalize disapproval of the practice in question. Judge Robert Bork contends:

> Where the constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights.[132]

Similarly, originalist William Van Alstyne writes:

> If the meaning of a clause cannot be established without recourse to meta constitutional appeals (or arguments of mere policy), that fact merely provides reason and straightforward explanation of the judicial conclusion that the challenged act of Congress cannot be said to fail to square with the constitutional clause invoked by the litigant who relied upon it.[133]

What is important about these two quotations, which are typical of the originalist position, is that they focus entirely on the method the judiciary should use in interpreting the Constitution. The emphasis is on judicial conduct and not on

the general and more important question of how the Constitution should be interpreted. Either the latter question is completely ignored or the method of constitutional interpretation is treated as a by-product of the definition of the proper judicial role.

At the very least, this is undesirable because regardless of the judicial role, there is a need to determine the proper method for Congress, the president, and state governments to use in interpreting the Constitution. All government officers take an oath to uphold the Constitution, and they need to know how to go about interpreting it. When a legislator decides whether to vote for a law restricting the right to abortion, the legislator must evaluate its constitutionality even if the Court could never rule on the subject under an originalist methodology. When the president has to decide whether to veto a law of questionable constitutionality, or evaluate the constitutionality of possible executive conduct (for example, whether to impound congressionally appropriated funds), the chief executive must interpret the Constitution.

Furthermore, under current justiciability doctrines, there are certain matters where the political branches of government have the final say over the meaning of the Constitution.[134] The Supreme Court has ruled that certain subjects pose a political question and therefore are not for the courts to review. For example, generally the Court has treated foreign policy as a political question and has refused to review the constitutionality of such executive decisions.[135] Especially in those instances where the Court is not involved, the chief executive and Congress need to interpret the Constitution. Often the decisions are in areas of crucial importance: Was the Vietnam War constitutional? Is the War Powers Resolution constitutional?

In fact, the originalist definition of the judicial role expands the need for constitutional interpretation by the political branches of government. Under originalism the Court is only involved where the Constitution is clear. In all other instances the decisions are left to the legislature and the executive. The absence of a Court decision does not release the political branches of their obligation to follow the Constitution. They need some method for interpretation.

The current debate is flawed because it has focused exclusively on the judicial role and has not provided any method of constitutional interpretation by the other branches of government. The originalists' obvious response to this criticism is that the other branches of government should also follow an originalist methodology.

First, this response reveals the misdirection of the current debate. Originalists justify originalism solely on the ground that if the judiciary uses any other methodology, it is usurping decisions of majoritarian institutions. This argument obviously does not justify why a majoritarian institution should use an originalist methodology. A completely different argument would need to be advanced to justify why the political branches should follow originalism. However, by deriving the method of constitutional interpretation from their concern over the proper judicial role, originalists simply assume that originalism is justified for

constitutional interpretation by all institutions and individuals. This is not to say that it is impossible to defend originalism as a proper method of interpretation by all parts of government; rather, the point here is that the antimajoritarian nature of judicial review at most argues for originalism in court decision making. Another theory must be advanced to justify the use of originalism by the politically accountable branches of government.

Second, as will be argued in more detail later, originalism is an especially undesirable method of interpretation if it is used by all branches of government for all decisions. The Constitution contains many gaps. If all branches of government are bound by originalism, and only may act if there is express constitutional authorization, no one can act in many instances. For example, consider the question, What institution in U.S. government can recognize foreign governments? Article II does not give the recognition power to the president. Neither does Article I nor Article III give this power to Congress or the courts, respectively. An originalist methodology would lead to the conclusion that no one in government has the power to recognize foreign governments.[136]

Nor is this example unique. For instance, what branch of government has the authority to remove Cabinet officials from office? This question is hardly academic—it led to the impeachment of Andrew Johnson.[137] Article II gives the president appointment powers but not removal powers. Article I does not give Congress removal powers. Does this mean that from an originalist perspective no one can remove Cabinet officers?

There are endless examples. An originalist methodology limiting the involvement of one branch of government might work, but originalism cannot be easily defended as a method for all constitutional interpretation.

Finally, originalism leads to hopeless indeterminacy when used by the other branches of government. If the Constitution is silent, should the absence of a prohibition be regarded as an authorization, or should the silence be regarded as a lack of authority? For example, does the president have the inherent power to invoke executive privilege? This question has been extremely important throughout U.S. history and was critical in determining whether President Richard Nixon would stay in office.[138] Article II of the Constitution does not mention anything about executive privilege. Does the silence mean that the president has no constitutional authority to claim executive privilege? Or does the absence of a prohibition of executive privilege mean that it exists?

The point of this discussion is to establish that it is necessary to determine the proper method of constitutional interpretation, and that originalism cannot be uncritically chosen as the appropriate methodology. The current debate is flawed because it focuses on just the judicial role and makes no attempt to ascertain how the Constitution should be interpreted.

An inquiry into the proper method of constitutional interpretation will reveal a great deal about the appropriate judicial role. Unfortunately, this inquiry has not occurred because of the misguided focus on reconciling judicial review with majority rule.

## WHAT THE DEBATE OVER CONSTITUTIONAL INTERPRETATION SHOULD BE ABOUT

Thus far in this chapter I have argued that there is a need for additional analysis of the proper method of constitutional interpretation because the debate in the current literature is fundamentally misdirected. As I have just argued, the central question to be answered is, How should meaning be given to the provisions of the United States Constitution? Questions of the responsibility and role of particular institutions are important, but such questions should only be considered in the context of answering the larger inquiry.

The remainder of this book suggests an alternative agenda for debate and presents arguments about the proper role of judicial review in interpreting the Constitution. The focus for discussion should be on questions such as: Why should society be governed by a constitution? Should the Constitution evolve or remain static? If the Constitution evolves, should the evolution be by interpretation or only by amendment? Who should be the authoritative interpreter of the Constitution? What constraints exist on judicial constitutional interpretation? Each of these questions is addressed, in turn, in the succeeding chapters.

# 2 Why Should U.S. Society Be Governed by a Constitution?

*Constitutional interpretation* is the process of giving meaning to specific constitutional provisions in order to resolve controversies confronting government.[1] As such, constitutional interpretation is an instrumental process; it exists to accomplish the goal of implementing the Constitution in particular situations. There is, of course, an underlying question: Why should the Constitution be followed at all? That is, why should the Constitution be regarded as authoritative?[2] There is nothing inherent to a written constitution that answers these questions. For example, the Constitution could be treated like the Declaration of Independence and viewed as a rhetorical document with no governing authority. Or the Constitution could be viewed as an initial blueprint for government, a starting place, that future governments could follow or ignore as they saw fit.

Virtually all the discussion about constitutional interpretation has ignored this question and simply assumed the authoritative status of the Constitution. Henry Monaghan explains this omission.

> The authoritative status of the written Constitution is . . . an incontestable first principle for theorizing about American constitutional law. . . . For the purposes of legal reasoning, the binding quality of the constitutional text is incapable of and not in need of further demonstration. It is our master rule of recognition.[3]

Monaghan does not explain why it is impossible and unnecessary to inquire why society chooses to be governed by a constitution. Identifying the reasons the Constitution is regarded as authoritative is of enormous value in determining the proper method of constitutional interpretation. For example, if society regards the Constitution as authoritative because the Framers are thought to have been divinely inspired, then constitutional interpretation will consist of trying to learn

and follow the Framers' intent. In other words, under this view, the Framers are looked to because they are regarded as having possessed unique wisdom and even having communicated God's will.[4] By contrast, if the Constitution is regarded as authoritative because of the perceived need for an antimajoritarian document to protect minorities from majority tyranny, then the appropriate method of constitutional interpretation is the one that best protects minority rights. The general point is explained by Larry Simon: "That which is valued or believed to be good about a constitution is the (or a) source of its authority, and interpretive methodology is derived accordingly."[5]

A full inquiry into the reasons for having an authoritative constitution would itself be a lengthy treatise. However, even a preliminary examination of the reasons why society should be governed by a constitution is useful in determining the proper method of constitutional interpretation. The analysis in this chapter is the basis for the conclusions drawn in subsequent chapters as to the need for constitutional evolution, the desirability of evolution by interpretation, and the appropriate allocation of institutional responsibilities. The first section of this chapter explores why U.S. society should be governed by a constitution (1) in order to protect the structure of government and fundamental rights from social majorities and (2) because a constitution is a powerful symbol uniting society. The second part of the chapter briefly examines countries that are governed without a constitution and shows how the absence of a constitution in these places is based on assumptions that are incongruous with fundamental values and norms in the United States.

## THE VALUES OF CONSTITUTIONAL GOVERNANCE

In thinking about why it is desirable to have a constitution, it is important to recognize that government and society could exist without one. Great Britain, for example, has no written constitution. If there were no constitution, society would structure government through informal agreements and by statutes adopted by the institutions accorded lawmaking authority. There likely would be some initial informal agreement creating the institutions of government, and then those institutions would determine both the procedures of government and its substantive enactments. For example, the Framers of U.S. government could have served as the initial legislature and, in that capacity, devised a structure of government embodied in a statute that could be altered by subsequent legislatures.

The absence of a constitution does not mean that individuals would possess no rights. Rather, an individual's rights would be embodied in statutes or would arise from common-law decisions of the courts (assuming that the society chose to accord such powers to its courts). Of course, even with a constitution, many rights are found in statutes, (e.g., the rights contained in the Civil Rights acts),[6] and others arise entirely from the common-law decisions of courts (e.g., rights against private deprivations of liberty and property found in tort law).[7]

How does U.S. government differ from this because it has an authoritative

constitution? First, a constitution that only can be amended through an elaborate and difficult process is much harder to change than are statutes. Whereas legislative enactments could likely be modified by majority rule of subsequent legislatures,[8] the U.S. Constitution can only be altered by action of two thirds of both houses of Congress and by ratification of three quarters of the states. The difficulty in amending the Constitution is reflected in there being only sixteen amendments in the almost 200 years since the adoption of the Bill of Rights. Second, a constitution is symbolically different from all other laws.[9] It is regarded with special reverence and thought of as foundational for U.S. government.[10] It is not just another statute.

The obvious question is, Why should a society generally committed to majority rule choose to be governed by a document that the majority cannot alter? Although, as explained in the first chapter, majority rule is not synonymous with democracy, certainly it is an important component of democracy in the United States, and there is a general commitment to the proposition that the people should govern. Laurence Tribe poses the question:

> Why a nation that rests legality on the consent of the government would choose to constitute its political life in terms of commitments to an original agreement—made by the people, binding on their children, and deliberately structured so as to be difficult to change.[11]

Why should past generations, long dead, continue to govern us through a document written for an agrarian slave society? Noah Webster observed that "the very attempt to make perpetual constitutions, is the assumption of a right to control the opinions of future generations; and to legislate for those over whom we have as little authority as we have over a nation in Asia."[12] The Constitution is a powerful antimajoritarian symbol—a statement that there is much that a simple majority of society cannot, and should not, change.

There are two major reasons why society should be governed by an authoritative constitution. First, such a document creating the structure of government and enshrining fundamental rights achieves desirable goals; it prevents dictatorship, lessens the likelihood of tyranny, maximizes protection of minorities, and best ensures safeguarding of individual rights. Second, and less commonly recognized, an authoritative constitution, written in sufficiently abstract terms that virtually everyone in society agrees with its provisions, serves as a powerful unifying symbol for society.

### The Constitution as a Limit on Majoritarian Decision Making

It is hardly original or profound to observe that a constitution exists to prevent tyranny by the majority, protecting the rights of the minority from oppression by social majorities. Historians have long observed that fear of despotism animated the Framers in drafting the U.S. Constitution.[13] Rebelling against what they

perceived to be the tyranny of the king of England, and fearing all exercises of power, the Framers desired a limited government. In fact, the first government the Framers created under the Articles of Confederation was found to be much too limited, with the national government lacking essential powers, such as the ability to issue currency and regulate commerce.[14]

In drafting the Constitution, therefore, the Framers wanted to create a government with the necessary authority but structured in such a way as to limit its ability to inflict injury or act tyrannically. A constitution specifying fixed terms in office for elected officials and detailing procedures for regular elections helped prevent dictatorships and ensured the government's accountability to the people. The fact that the terms of office and procedure for elections were specified in the Constitution meant that current officeholders and could not simply enact a law lengthening their terms or canceling the elections.

Likewise, the Constitution specified the limited powers of each branch of government and created a system whereby generally two branches needed to act for anything to occur. Enacting a law requires congressional passage and presidential approval (or a congressional supermajority to override a veto). Enforcing a law requires executive prosecution and judicial conviction. Again, the effect is to prevent any branch of government from asserting absolute authority. A constitution ensures that this structure cannot be easily changed, especially in times of crisis when there is a tendency toward government by dictatorship.

Furthermore, the Constitution safeguards basic liberties from social majorities, providing additional protection for political minorities. For example, Article I of the Constitution prohibits Congress or the states from enacting ex post facto laws—laws punishing people for acts that were legal when committed—and bills of attainder—laws singling out individuals for punishment. Ex post facto laws and bills of attainder were viewed as important tools used to persecute political enemies of ruling governments.[15] Article I also prevents Congress from suspending the writ of habeas corpus, a crucial vehicle for protecting those who are unjustly imprisoned.

Additionally, Article I requires that all expenditures be pursuant to an act of Congress, limiting the ability of any group to spend money for its own benefit. Article I, section 10, prohibits any state from impairing the obligation of contracts, reflecting a fear that a legislature responsive to the majority of society, who are debtors, would act to harm the minority, who are creditors.[16] Furthermore, Article III of the Constitution states that all trials must be by jury; trial by a jury of peers was regarded as a safeguard against sanctions imposed by despotic rulers.

If these protections of individual liberty were placed just in statutes, a tyrannical government could overrule them. Although the assurance of electoral accountability through regular elections and the checks imposed by other branches of government provide some protection against tyranny, these limits were viewed as inadequate. What if a majority of society favored the despotic actions because the oppression targeted an unpopular group? Electoral accountability provides inadequate protection to the minority because support from the majority is sufficient to support the oppressing government. And if the majority controls both the legisla-

ture and the executive, checks and balances offer relatively little protection. To provide an additional safeguard should such majority tyranny occur, individual rights were placed in the Constitution. In the face of a tyrannical majority, at least the minority would be assured by judicial enforcement of the Constitution that there would not be ex post facto laws, bills of attainder, or confiscatory taxes, and no matter what, there would be the protection of writs of habeas corpus and trial by jury.

In fact, during the ratification process, many colonies expressed concern that the text of the Constitution inadequately protected individual rights. Fearing government power, some colonies insisted that a Bill of Rights be added to the Constitution.[17] In accord with this demand, the first Congress proposed, and the states ratified, amendments to the Constitution that ensured protection of crucial shared values such as freedom of speech, press, and religion; protection against unreasonable searches and seizure; the right to trial by jury in criminal and civil cases; freedom from self-incrimination; a prohibition of cruel and unusual punishment; assurance that life, liberty, and property would not be taken without due process of law; and a guarantee that property would not be taken for public purposes without just compensation. The protection of property was not of incidental concern. There is strong evidence that the Constitution was viewed as a way to protect the landowning minority from actions by the majority to confiscate their wealth and property.[18] By enshrining rights in an authoritative constitution, immune to easy modification by social majorities, the Framers thought they were providing crucial protection of political minorities and unpopular groups.

So a constitution represents an attempt by society to limit itself to protect the values it most cherishes. A powerful analogy can be drawn to the famous story of Ulysses and the Siren.[19] Ulysses, fearing the Siren's song, which seduced sailors to their death, had himself bound to the ship's mast to protect himself from temptation. Ulysses's sailors plugged their ears with wax to be immune from the Siren's call, whereas Ulysses, tied to the mast, heard the beauty of the song but was not harmed by it. Despite Ulysses's pleas for release, his sailors followed his earlier instructions and kept him bound and unable to heed the Siren's song. His life was saved because he recognized his weakness and protected himself from it.

A constitution is society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. A constitution, like Ulysses's instructions to his sailors, is a precommitment to a set of commands. Jon Elster writes that precommitment is a way of protecting oneself against imperfect rationality; "[b]inding oneself is a privileged way of resolving the problem of weakness of will; the main technique for achieving rationality by indirect means."[20] This binding, or precommitment, is a way of "achieving by indirect means the same ends as a rational person could have realized in a direct manner."[21] Because individuals and groups are seldom perfectly rational, and frequently irrational by their own standards, they hedge against their weakness of will with precommitments to people, ideas, and institutions.

To make this less abstract, society binds itself in a constitution to protect its

most important values from the threats that history shows are posed by the passions, pressures, and irrationalities produced by crises and public events. Each society has certain values that it regards as fundamental. For example, since the earliest days of U.S. history, this society has valued public participation in government decision making. There has always been widespread belief in the desirability of a representative democracy and the power of the people to govern through regularly scheduled elections and by speaking out to influence the course of government decision making. There likewise has been deep concern for protecting the individual from arbitrary government power. The colonial experience and earlier English history teach the need to protect against abuses such as ex post facto laws, forced self-incrimination, and cruel punishments.

Ideally, U.S. society would always honor and protect these values, making precommitment, binding ourselves to the mast of the Constitution, unnecessary. History teaches, however, that there are Sirens' songs that seduce nations away from even their most prized values. Crises—economic, political, and military—cause pressure for expedient solutions often at the expense of deeply held beliefs. Often, one reaction to crisis is a desire to centralize power in a strong leader—an action that risks dictatorship. Another reaction to turmoil is to suppress freedoms. Dissenters, for example, frequently are prosecuted during times of war or political upheaval. During World War I and more recently during the McCarthy era, individuals were convicted and sentenced to long jail sentences for quite harmless utterances.[22] Moreover, crises often lead to a desire to find scapegoats and to the persecution of minorities. Hitler's "final solution" was devised during Germany's severe postwar depression. U.S. internment of Japanese-Americans during World War II evidences how even a strong commitment to freedom can give way during a perceived crisis.

History teaches that the passions of the moment can cause people to sacrifice even the most basic principles of liberty and justice. A constitution is society's attempt to protect itself from itself. The Constitution enumerates cherished values—guarantees of political participation, individual rights, protections from the government—and makes change or departure very difficult. Thus, like Ulysses, society knows there is a Siren and through a constitution ties its hands to help resist a song that might cause short-term desires to triumph over long-term interests.

Although the analogy between the Constitution and Ulysses is appealing, there is a problem with it. Ulysses tied his own hands; through a constitution society binds future generations. Or phrased differently, one might respond to all of the above discussion by saying that it only explains the reasons for the initial adoption of the Constitution; it does not justify why society should continue to be governed by it. The Framers of the Constitution feared their least rational moments and wanted to protect their values by binding themselves in a constitution. But this does not justify our continued governance by the document. The fact that the Framers desired an authoritative constitution says nothing about why modern society should have one. There must be reasons for following the Constitution

apart from the fact that men who lived 200 years ago thought it a good idea to be governed by it.

One response is that modern society, too, fears the Siren's song and wants a constitution to bind itself to, to ensure protection of fundamental values. The same motives that inspired the drafting and ratification of the Constitution—the fear of the effects of short-term impulses in decision making—remain and justify the continued existence of a constitution. The widespread regard for the Constitution and the absence of any call for its abolition, or even for a major overhaul, indicate the ongoing belief in the desirability of an authoritative constitution.

Although this argument of the continuing acceptance of the Constitution has great force, it is not enough to simply assert that the Constitution should be regarded as authoritative because the people of current generations seem to consent to it. Because changing the Constitution is extraordinarily difficult, requiring supermajorities of many separate institutions, it is not possible to assume that the majority does consent to the Constitution just because they continue to be governed by it. Even if the majority objected to it, change would be impossible until the vast majority of society shared their views. It is possible that the absence of objections to the Constitution reflects a realization of how difficult it would be to have it eliminated as a part of U.S. government. More likely, there truly is a widespread acceptance of the desirability of the Constitution and a sense that it is good for society to continue to be governed by it.[23]

The existence of a constitution can be justified by establishing that there are values which should be entrenched in society and made difficult to ignore or overrule, and by demonstrating that a constitution is an effective vehicle for protecting these values. Political and moral theories support the existence of such values. For example, there is a voluminous body of literature developing many different theories justifying the existence and protection of individual rights.[24] The essence of the concept of individual rights is that they serve as "trumps" over majoritarian decision making.[25] My task here is not to justify the existence of rights or even to recount some of the many rights theories which have been developed. Rather, my point is that if one begins with the premise that individual rights should be protected from government interference (and I recognize that not all do), then a constitution can be defended as a means for entrenching these values and protecting them from infringement.[26]

Likewise, if one accepts the arguments of political and moral philosophers that equality is a value which should be honored and promoted by government, then a constitution is a way of enshrining and advancing that value. Again, my task is not to justify equality or even to begin the difficult task of defining it.[27] Instead, the claim is that if one starts with the premise that equality matters—for example, that government should not arbitrarily discriminate against social minorities—then one wants a vehicle for ensuring that the value is not disregarded. Placing the value in a constitution which is made deliberately difficult to change, and providing for enforcement of the value by an institution which is not directly accountable to the people is one way to safeguard and foster equality.