to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[19]

Similarly, in *Meyer v. Nebraska*, in 1923, the Court stated that the liberty of the due process clause protected "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[20]

In *Meyer* the Court invalidated a state law that prohibited the teaching of German in the public schools because the Court deemed such a restriction to interfere with the liberty of parents to control the upbringing of their children.[21] Similarly, in *Pierce v. Society of Sisters* the Court declared that an Oregon statute prohibiting parochial education unconstitutionally interfered with the "liberty of parents and guardians to direct the upbringing and education of children under their control."[22] Nothing in the Constitution's text or history specifies protection of family autonomy. The Court used its discretion to interpret the abstract term *liberty* to protect something it deemed extremely important.

Most notably during this period, the Court interpreted the liberty of the due process clause as protecting freedom of individuals to enter into contracts and held that states could limit this freedom only if the restriction was necessary to achieve an important public health, safety, or moral purpose.[23] The Court implemented its commitment to laissez-faire capitalism by striking down almost 200 state and local laws that attempted to protect workers and consumers.[24] Again, the decisions were not based on explicit textual or historical support. Rather, the Court applied its own modern values in deciding the content of a constitutional provision.

After 1937 the Court abandoned the earlier restrictive interpretations of the commerce clause[25] and the protection of economic liberties through the due process clause.[26] These choices reflected a shift in social values; the Court exercised its discretion to reflect changing conceptions about the proper role of government. Since 1937, economic liberties and the protection of property have been deemphasized; the focus has been on safeguarding political freedoms and "insular minorities."[27]

It is hardly controversial to point out that virtually every major decision in the last 50 years, and especially since the Warren Court began in 1954, reflects a nonoriginalist methodology. The ambiguous language of the equal protection clause did not compel the Court to end school segregation and invalidate Jim Crow laws. The right to a fair trail embodied in the Sixth Amendment does not necessarily mean that the government has the obligation to provide free counsel to indigents; in fact, an earlier case explicitly held that no such requirement exists.[28] The Constitution does not necessitate the exclusion of evidence obtained

in violation of the Fourth, Fifth, and Sixth amendments.[29] Prayers in public schools and financial aid to parochial schools are not explicitly forbidden by the First Amendment.[30] The right to travel is nowhere mentioned in the Constitution.[31] Nothing in the document or its history prevents a state from prohibiting the use of contraceptives or forbidding abortions.[32] In fact, the Constitution's text does not even state that the Bill of Rights must apply to the states.[33]

In each of these cases, the Court made a value choice. The decisions reflected the Court's judgment about what the Constitution should mean. The results were not the product of reasoning from a static, unchanging document; they were the result of open-ended interpretation. Frequently, the Court has admitted openly that its decisions reflect not determinate solutions to constitutional issues but, rather, judicial choices as to what the Constitution should mean.[34]

In other words, since the earliest days of U.S. history, open-ended modernism has been the model that best describes constitutional decision making. The Court has always used contemporary morality to determine the appropriate constitutional norms. Predictions of doom—that society could not accept a government where judges had discretion to choose constitutional values[35]—are disproved by history. The Court has survived and thrived while doing exactly what critics say will make it unviable. My conclusions are not radical calls for reformation of the U.S. political system; they are descriptions of 200 years of practice.

Thus, properly focused, the debate over constitutional interpretation is really about the question of whether open-ended modernism should continue. This book has attempted to provide a normative defense of the desirability of such an approach. In concluding, it is worth considering possible objections to my position. Several possible objections have already been answered in previous chapters. For example, Chapter 1 explained why it is misguided to criticize judicial decision making as being antimajoritarian. Chapters 3 and 4 discussed why there is nothing inherent to a constitution that requires that its meaning be fixed to that which its drafters intended. Chapter 6 responded to the argument that open-ended Court review risks judicial tyranny.

I can identify three other objections that might be offered against open-ended modernism. The first and probably most frequent, and perhaps most important, objection is that the candid public admission that the Court was following open-ended modernism would cost the judiciary its institutional legitimacy. Political theorists point out that compliance with an institution's decrees is dependent on the body's legitimacy.[36] Max Weber, who began the discussion of legitimacy among social scientists in the 1890s, wrote that "where authority is accepted as legitimate, [behavior of those being ruled] is influenced in such a way that they obey commands as if they were self-evident, natural, and identical with their own convictions."[37] In other words, "legitimacy produces a reservoir of support guaranteeing the cooperation of members of the polity even in the case of quite unpleasant policies."[38]

The judiciary's legitimacy is especially important because courts lack authority to enforce their own rulings. As such, it is argued that other branches of govern-

ment will comply with the Court only if it maintains its credibility.[39] Without this credibility, judicial decisions will be disobeyed and the Court will become an ineffective institution. For this reason, constitutional experts such as Felix Frankfurter, Alexander Bickel, and most recently, Jesse Choper have argued that the Court's approach to constitutional interpretation must consciously strive to protect the judiciary's institutional legitimacy.[40]

Critics of open-ended modernism argue that the Court's credibility depends on people believing that the Court is merely applying the Constitution in a determinate, discretion-free manner to decide particular cases. Daniel Conkle recently stated that open-ended judicial decision making in human rights cases "would undermine . . . the fragile legitimacy that attaches to Supreme Court pronouncements of constitutional law; shorn of that legitimacy the Court's constitutional decisions would face all but certain popular repudiation and the Court's powerful voice would fall to a whisper."[41] Similarly, Richard Saphire remarked that a "candid confession of the policymaking nature of noninterpretive review may not only undermine its ability to protect human rights . . . but may also adversely affect its ability to perform an interpretive function."[42] In essence, it is argued that even though the Court has always followed open-ended modernism, the people do not really know this. If the deception were to end, if the people were to realize that the emperor really has no clothes, the Court's legitimacy would crumble.

First, the claims about the fragility of judicial legitimacy are mere assertions, unsupported by any empirical or theoretical support. Legitimacy is an empirical notion, requiring measurement of the degree of support for the Court's decisions and the extent of disobedience that corresponds to various levels of support. As such, arguments about legitimacy require an analysis of which types of decisions, and popular beliefs about those decisions, produce what degree of respect or disrespect for the Court. Yet those who use the concept offer no empirical support for their conclusions that particular theories of judicial discretion will undermine the Court's legitimacy. Nor do they support their conclusion with the voluminous writings from political scientists concerning the factors that account for an institution's legitimacy. In the current literature about judicial credibility, there is nothing but an assertion that the Court's legitimacy is fragile and that it would be undermined by a realization that the judiciary followed open-ended modernism.[43] At the very least, discussions about legitimacy should wait until empirical work is done of the sources of judicial legitimacy and the factors that might undermine it. For decades, critics of judicial activism have been making legitimacy arguments that are completely unsupported assertions.

Second, the argument about legitimacy assumes that the people believe that judicial decisions are entirely formalistic, with the Court reasoning from clear constitutional premises to determinate conclusions. Although this, too, is an empirical question about public attitudes, I find it difficult to accept that the people seriously believe that the text of the Constitution protects a woman's right to an abortion or prohibits prayers in public schools. I believe that the public understands that "judicial decisions are not babies brought by constitutional

storks."[44] At some point in their lives, they have studied the Constitution and realize that it is written in general language that does not provide determinate answers to constitutional controversies. Popular press coverage of decisions such as *Brown v. Board of Education* and *Roe v. Wade* remind people that it is the Court making the decision—not the Constitution being mechanically applied to desegregate the schools or protect a right to abortions.

Third, I believe that history demonstrates that judicial legitimacy is not fragile. Throughout this century, the Court has handed down controversial rulings not supported by the text of the document or the intent of the Framers. Yet the Court has retained its legitimacy and its rulings have not been disregarded. Judge John Gibbons remarked that the "historical record suggests that far from being the fragile popular institution that scholars like Professor Choper . . . and Alexander Bickel have perceived it to be, judicial review is in fact quite robust."[45]

In fact, even at the times of the most intense criticism of the Supreme Court, the institution has retained its credibility. For example, opposition to the Court was probably at its height in the mid–1930s. In the midst of a depression, the Court was striking down statutes thought to be necessary for an economic recovery.[46] In an attempt to change the Court's ideology, President Franklin D. Roosevelt proposed to change the membership of the Court by increasing its size—often referred to as "Court packing."[47] Roosevelt's proposal received little support. The Senate Judiciary Committee rejected the proposal and strongly reaffirmed the need for an independent judiciary.

> Let us now set a salutary precedent that will never be violated. Let us, the Seventy-fifth Congress, declare that we would rather have an independent judiciary, a fearless Court, that will dare to announce its honest opinions in what it believes to be defense of liberties of the people, than a Court that, out of fear or sense of obligation to the appointing power or factional passion, approves any measure we may enact.[48]

This is a telling quotation and a powerful example because if anything should have undermined the Court's legitimacy, it was an unpopular Court striking down popular laws enacted by a popular administration in a time of crisis. Yet even then the Court and the Constitution retained their credibility and legitimacy.

Nor did the activism of the Warren Court lessen the judiciary's credibility. Certainly, its decisions desegregating schools and ending prayers in public schools were controversial and engendered intense opposition. But opinion polls show that in a time of general distrust of government the Court has suffered the least erosion of public confidence of any branch of government.[49] There is no indication that the Warren Court's activism has jeopardized the Court's legitimacy or that disregard of judicial decisions is imminent. Ely remarked that

> [T]he possibility of judicial emasculation by way of popular reaction against constitutional review by the courts has not in fact materialized in more than a century and a half of American experience. The warnings probably reached their peak during the Warren years;

they were not notably heeded; yet nothing resembling destruction materialized. In fact, the Court's power continued to grow and probably never has been greater than it has been over the past two decades.[50]

Why *has* the Court maintained its legitimacy even when issuing highly controversial rulings? Social science theories of legitimacy offer some explanation. Max Weber wrote that there are three major bases for an institution's legitimacy: tradition, rationality, and affective ties.[51] That which historically has existed tends to be accepted as legitimate.[52] Therefore, 200 years of judicial review grants the Court enormous credibility. Additionally, that which is rational is likely to be regarded as legitimate. The judiciary's method of giving detailed reasons for its conclusions thus helps to ensure its credibility. Finally, that which is charismatic, things to which people have strong affective ties, are accorded legitimacy. It has long been demonstrated that people feel great loyalty to the Constitution.[53] Therefore, Court decisions deciding constitutional claims also are likely to be regarded as legitimate.

In part, too, the Court's legitimacy is based on the public's desire to be governed by a constitution and society's recognition that there needs to be an institution to resolve disputes for which there is no "right" answer. Certainly everyone recognizes that conflicts arise in deciding what a provision means or how it should be applied in particular situations. The judiciary is accepted as a useful institution to resolve controversies, even when people disagree with the Court's ruling.

Finally, arguments about judicial legitimacy wrongly assume that the Court's credibility is related to its theory of decision making. In fact, few besides academics pay close attention to the theoretical underpinnings of decisions. Instead, the Court's legitimacy is attributable largely to public acceptance of the results of particular decisions and the methods used to reach those results. If the results in a large number of cases are unacceptable over a long period of time, the Court's legitimacy may suffer regardless of the theory of judicial review. Conversely, if the results in most cases are acceptable to most people, the Court's credibility will be enhanced.[54] I believe, for example, that the Supreme Court's desegregation decisions, although highly controversial at the time and fiercely opposed, have increased the Court's credibility. By ending laws that explicitly discriminated against blacks, the Court performed a vital social function and enhanced its legitimacy.

Additionally, the Court's credibility seems to rest upon the public perception of the Court as free from political pressure, bound by the convention of reaching rational decisions that are justified in opinions, and capable of protecting people from arbitrary government. Social scientists have established that an institution receives legitimacy by following accepted procedures.[55] Thus, the courts gain legitimacy from the judicial method, from the scrupulous avoidance of personal interests, and from the commitment to reaching decisions on the merits. Additionally, the Court enhances its credibility by writing persuasive opinions that

justify its conclusions.[56] Judicial opinions, as explained in Chapter 5, demonstrate that the decision is not arbitrary and can persuade opinion leaders for matters concerning the legal system—scholars and lawyers—as to the appropriateness of the results.

In fact, a strong case can be made that it is the originalists' attack on the Court that runs the greatest risk of undermining the Court's credibility and legitimacy. Conservatives in the Reagan administration and in academia repeatedly state publicly how the Court's decisions lack constitutional authority and are in excess of the judicial role. If anything might undermine the Court's credibility, it would be these attacks. I am not, of course, advocating censorship of the conservative critics. I just wish to observe that the judiciary's credibility is the product of many factors, including the actions of the critics. It is paradoxical for the critics to claim judicial credibility as a primary justification for their approach to judicial review when it is their criticism that potentially threatens the Court's credibility.

In other words, so long as the Court's results and methods are accepted, the judiciary will retain its legitimacy, even if the people realize (if they do not already know) that the Court is following open-ended modernism. It is easy to assert that almost anything can undermine the Court's credibility. The reality is that even a frank admission of the judicial method is unlikely to diminish the institution's legitimacy.

A second major objection to open-ended modernism is that it renders the Constitution unnecessary and constitutional law meaningless. If judges can give a provision almost any meaning, why have a constitution at all?[57] If interpretation is truly open-ended, does the document serve any purpose? It would be argued that the choice to be governed by a document is a commitment to be ruled by something specific, so that constitutional law must search for a way to give determinate meaning to constitutional provisions.

In large part, this argument is answered by analysis presented earlier. Society benefits from having a constitutive document written in general language. The abstract language in the document serves as a vessel that the Court fills with modern meanings. The process of interpretation does not render the abstract language meaningless. To the contrary, the document is valuable because it states the fundamental values that unite society—liberty, equality, freedom of speech. The Court's determination of the specific content of these values reinforces their importance and increases their internalization by members of society. To say that there is great discretion in filling the vessel does not establish that the vessel, the Constitution, is unimportant or nonexistent. In other words, the fact that an abstract document gains specific meaning from interpretation does not render the document unnecessary. The Constitution is a vehicle for the protection of fundamental values from majoritarian pressures and a symbol that unites the country.

But, it might be argued, if constitutional law is a matter of judges choosing values, is it not all arbitrary? Is it even possible to discuss constitutional law if doctrines just reflect ideological choices of the justices? What is constitutional law about under open-ended modernism? Surely, it is not about what the Framers

intended, because their intent is not determinative under a document that evolves by interpretation. Nor, for the reasons discussed earlier in this chapter, is it about how to construct a methodology of judicial review that will preserve the Court's legitimacy.

I suggest that discussions about the Constitution—both by courts and commentators—should focus on three questions: What values are worthy of constitutional status? How should those values be applied in particular situations? and Has the Court's result been adequately justified? Certainly, these are difficult questions about which there will be tremendous disagreement, but they are questions of enormous importance for society.

Inescapably, constitutional law requires normative analysis about what values should be protected from majoritarian decision making. Because the Constitution states values at a high level of abstraction (e.g., equality, liberty), and because there are no definitive sources for determining specific meanings, choosing values inevitably is an inquiry into political and moral theory. There probably is no more crucial or enlightening question than asking what we as a nation should care about most deeply and what is so vital that it should be constitutionalized.

Certainly, academic literature can play an essential role by advocating and discussing the importance of various interests. In fact, much of the literature about constitutional interpretation is valuable, not because of its discussion of how to reconcile judicial review with majority rule but because of its exploration of the values that the Court should protect. Jesse Choper demonstrates that the Court's mission should be to protect individual liberties.[58] John Hart Ely establishes that participational values must be safeguarded by the Court in a democratic society.[59] Michael Perry demonstrates that the Court must act to protect institutionalized persons who are usually ignored by the political process.[60]

The judiciary should be asked, through a process of argument and reflection, to identify values so fundamental as to merit constitutional protection. The political branches of government and critics can respond to the Court's rulings so that, in essence, a dialogue about values develops. This process puts consititutional law at the center of society—exactly where a constitutive document should be.

Perhaps the aversion to this view of constitutional law reflects a feeling that because all value choices are subjective, it is useless to discuss values and impossible to reason about them. In a society where there is general acceptance of moral skepticism and little apparent belief that there is a natural law, discussion of values might appear futile. After all, for a moral skeptic it is impossible ever to prove absolutely that a value is true or that one value is preferable to another.

However, even accepting the premise of value relativism, discussions about values are possible and indeed essential. It is possible to identify common, shared values and reason from them. If quality education is an accepted value, and studies prove that separate schools deny quality education to blacks, then it can be argued that it is necessary to desegregate schools. If fair trials are valued, and if counsel is believed to be essential to a fair trial, and if society believes the poor are entitled to equal justice, then it is possible to argue for government-provided

counsel for indigent defendants. In other words, for a skeptic, moral reasoning consists of identifying shared values, common premises, and reasoning from them. The fact that the premises cannot be proved to be true does not render the process unimportant or nonexistent.

Society benefits from open discussions about values. Values are what we as a society care about. To ignore them because of the difficulty of discourse is to risk undermining that which is regarded as most important. The inability to ever resolve the dialogue, the fact that it is inherently open-ended, is what makes it essential that the discussion occur. If correct values were easily identifiable, constitutional decision making would be an easy, noncontroversial process. But given value conflicts and disagreements over how to resolve them, dialogue is essential to identify shared values and provide rational decision making. Above all, therefore, constitutional law is a discourse about what values should be protected.

Additionally, constitutional law is a discussion about how the values should be applied in particular cases. As explained previously, conflicts among constitutional values are inevitable. Society desires many objectives that often conflict. There is a tension between liberty and equality, between the interests of the individual and the community. No matter what—with or without judicial action—choices are made between the conflicting values. For example, how should the tension be resolved between protecting an individual's reputation and the adverse effects of the libel law on the First Amendment? Or, how should the community's right to define its morality be weighed against an individual's right to view obscenity? Without judicial action, these questions are decided in the political process. Constitutional law provides an alternative process for decisions, one emphasizing reflection and careful choice.

Thus, constitutional law is not just about what values are worthy of protection; it is also about how to implement those values, especially when there is a conflict with other important norms. Constitutional law exists to substitute rational choices for political fiat. Commentators inform the process by pointing to inconsistencies in the reasoning process and exposing errors in the balancing of competing interests. The open criticism of judicial decisions allows other branches of government, scholars, and future litigants both to persuade the Court that it erred in earlier balancings and to influence subsequent decisions.

Finally, constitutional law is a discussion of judicial opinions, a consideration of whether the Court has adequately justified the results in particular cases. Has the Court sufficiently defended its premises, correctly reasoned from them, accurately stated precedent, properly reconciled its decision with earlier holdings? These are the questions asked about decisions in every field; they are the focus of virtually every class in law school. It is hardly surprising that they are also the subject matter of constitutional law.

Thus, constitutional law is about values. It is the vehicle society has chosen to protect that which it deems to be most important. I believe that brushing aside futile inquiries as to the Framers' intent, and recognizing that constitutional law is about moral choices, will focus attention on, and increase dialogue about

values. Conflicting views about values do not disappear just because they are ignored. Open discussion is society's best hope.

Again, I openly recognize what was discussed in Chapter 6: that defining constitutional law in this way does create a tension with one of the basic purposes of a Constitution, precommitment to and preservation of basic values. The more open-ended constitutional law is, the more it can be doubted whether there is any assurance of protection of the Constitution's values. There is a tension between wanting commitment to protect fundamental values and desiring change to permit progress. Yet, as argued in Chapter 6, the Constitution and judicial review offer the best mediation of this tension. A court, whose role is defined as protecting and applying the Constitution's values, offers more protection than would exist without judicial review; and a judiciary with authority to interpret the Constitution enables its underlying purposes to be served much more than if there were no opportunity for evolution by interpretation.

A final objection to my position is that this is the wrong time for someone with my liberal values to be arguing in favor of judicial activism. With a majority of the Supreme Court's justices being over 75 years of age, and with a conservative president, there is the prospect for an extremely conservative Court for the foreseeable future. According to this argument, liberals should be arguing for judicial restraint or devising theories that will yield the progressive holdings of the Warren Court but not the reactionary rulings of a Reagan or Rehnquist Court.

I do not minimize the damage the Burger Court has done to constitutional rights I value. Nor do I underestimate the possible harms of a Reagan Court, which could last well into the twenty-first century. However, I believe that it is futile to search for a model that produces liberal but not conservative interpretations. There is no theory that ensures that in the future the Court will behave like the Warren Court and not the Lochner Court. The judiciary chooses certain values to protect, and these values depend on the identity of the justices. Nor do I deny that judges tend to be appointed from elite backgrounds and historically the Court has been quite conservative.

Thus, the question in deciding whether there should be constitutional judicial review is whether the benefits of a Warren Court, discounted by its future improbability, are worth the costs of a Lochner, a Burger, or a Reagan Court. For a conservative, obviously, the examples are reversed: Are the harms to their values from a Warren Court worth the benefits they see from a future Reagan Court? The conclusions I have established throughout this book explain why it is impossible to gain the benefits of judicial discretion without accepting the costs. Discretion can produce good or bad decisions; it is wishful thinking to believe that there is a model that ensures that an indeterminate process will always produce a certain result.

I see two possible ways to argue that, on balance, judicial review is desirable. One is to focus on the examples and argue from history. I believe that the benefits from the the Warren Court were enormous and illustrate the need for a politically insulated institution to identify and protect fundamental values. Desegregation of

the South and the movement toward racial equality would have been much slower and more difficult without judicial action. The South would not have voluntarily eliminated its Jim Crow laws, and Congress during the 1950s was not about to act to protect southern blacks. Equal justice, still more an illusion than a reality, was immeasurably advanced by decisions like *Gideon v. Wainwright*, which ensured counsel for indigent defendants.[61] It is almost unthinkable that the federal government should be able to discriminate on the basis of race or gender because there is no express constitutional provision compelling the national government to provide equal protection. The reapportionment of state legislatures would not have occurred without judicial action, and the Court's enforcement of a "one person/one vote" rule has made state legislatures much more responsive and effective in dealing with urban problems.[62] The Warren Court demonstrated how large the benefits of constitutional review can be in its protection of blacks, its commitment to equal justice for the poor, its safeguarding of the rights of criminal defendants, and its protection of rights such as privacy, travel, and speech.

I realize that my examples and the conclusions drawn from them can be challenged. There were only a relative handful of decisions protecting individual liberties before the Warren Court. I am hopeful that history will prove that the Warren Court is not an aberration, that the future will again show that the judiciary is the best institution for protecting fundamental values. I believe that the enormous benefits of the Warren Court will make it a model for future Courts and help ensure that the Court will be a progressive force for liberty and equality in society. Furthermore, if misleading methodological criticisms of judicial activism are removed, perhaps it will be even more likely that the Court will reach its potential as a voice for social equality and individual rights.

Yet I have no way of proving this. It is difficult to know how to add up the benefits of all past "good" decisions and weight them against the costs of all past "bad" decisions. Therefore, I suggest that the best way to determine the proper method of constitutional decision making is not to try and add up the examples but rather to structure an inquiry about government that will focus discussion on the purposes of the Constitution and the best way to accomplish them. The focus should be on basic normative questions: Should society be governed by a constitution? Should the Constitution evolve or remain static? Should evolution be by interpretation or by amendment only? Who should be the authoritative interpreter of the Constitution? and What limits should exist in the interpretive process?

This book has begun to provide my answers to these questions and to describe why, on balance, it is desirable for society to be governed by a constitution that evolves by open-ended judicial interpretation.

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Notes

I find it distracting in reading a book to have to shift back and forth between the text and the notes. Therefore, to minimize such distractions, I tried to avoid textual notes and generally tried to reduce the number of notes. Nonetheless, given the rich literature on this subject, the notes are still plentiful. My compromise has been to write the text so that it can be understood without reference to the notes but to make the notes as complete as possible for those interested in my references.

PREFACE

1. For examples of attacks by Attorney General Edwin Meese and Assistant Attorney General William Bradford Reynolds against the current Supreme Court and especially Justice William Brennan's approach to constitutional interpretation, *see Reynolds Accuses Justice of Misinterpreting Fourteenth Amendment; Rights Enforcer Assails Brennan's View of Constitution*, Los Angeles Times, Sept. 14, 1986, at 4, col. 1; *Meese Attacks Judicial Activism; Intensifies Criticisms of Decisions Based on Social Theories*, Los Angeles Times, Nov. 16, 1985, at 4, col. 1. Justice Brennan publicly, in speeches, responded, attacking the critics and defending his vision of the Constitution. *See, Justice Brennan Calls Criticism of Court Disguised Arrogance*, Los Angeles Times, Oct. 13, 1985, at 5, col. 1.

2. In the last several years, a number of prominent books have been written on constitutional interpretation and judicial review, including J. Agresto, *The Supreme Court and Constitutional Democracy* (1985); P. Bobbitt, *Constitutional Fate* (1980); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); A. Miller, *Toward Increased Judicial Activism* (1982); M. Perry, *The Constitution, the Courts, and Human Rights* (1982). Additionally, there have been several symposiums devoted to constitutional interpretation and judicial review. *See, e.g., Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 259 (1981); *Interpretation Symposium*, 58 S. Cal. L. Rev. 1

(1985); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. Dayton L. Rev. 443 (1983); *Judicial Review versus Democracy*, 42 Ohio St. L. Rev. 1 (1981).

3. Bowers v. Hardwick, 106 S.Ct. 2841 (1986) (upholding a Georgia statute that prohibited oral-genital and anal-genital contacts, even in private between consenting adults).

4. *Id.*, at 2846 ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental").

5. *See* discussion in Chapter 1, infra, text accompanying notes 14–29 (describing focus of current debate as centering on reconciling judicial review with majority rule).

6. *See* discussion in Chapter 6, text accompanying notes 1–24 (describing search for objective, discretion-free, constitutional interpretation).

7. The terminology of the debate has varied somewhat. The terms *originalism* and *interpretivism* have been used interchangeably, as have the words *nonoriginalism* and *noninterpretivism*. Throughout this book, I will use *originalism* and *nonoriginalism* to refer to the two basic paradigms. In part, this is because all forms of decision making claim to be interpretation and also because the term *originalism* reflects its essential premise—decision making based on the Framers' original intentions.

Thomas Grey is credited with originating the distinction in these terms. Grey, *Do We Have an Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975). The debate over judicial review has continued in these terms. *See, e.g.*, J. Ely, *supra* note 2, 1–14; M. Perry, *supra* note 2, at 1; Saphire, *Judicial Review in the Name of the Constitution*, 8 U. Dayton L. Rev. 745–746 (1983).

As Ely observes, the distinction between originalism and nonoriginalism parallels the more general distinction between positivism and natural law; originalism is similar to positivism, and natural law is one type of nonoriginalism. J. Ely, *supra* note 2, at 1 (emphasis omitted).

CHAPTER 1

1. As Dean Choper points out, "Reconciling judicial review with American representative democracy has been the subject of powerful debate since the earliest days of the Republic." J. Choper, *Judicial Review and the National Political Process* 4 (1980). *See, e.g.*, L. Goldberg and E. Levinson, *Lawless Judges* (1935); Black, *The Supreme Court and Democracy*, 50 Yale L. J. 188 (1961); Commager, *Judicial Review and Democracy*, 19 Va. Q. Rev. 417 (1943); McClesky, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 Hous. L. Rev. 354 (1966); Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1952); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893); Wright, *The Role of the Supreme Court in a Democratic Society*, 54 Cornell L. Rev. 1 (1968).

I should clarify at the outset that my focus in this book is only on interpretation of the United States Constitution. Although state constitutions are similar in many respects, they usually differ so greatly from the United States Constitution that interpretation of state constitutions would be a separate inquiry. *See, e.g.*, L. Tribe, *Constitutional Choices* 26, 289 n.43 (1985) (greater detail of state constitutions means they engender less respect); J.

Corsi, *An Introduction to Judicial Politics* 104–114 (1984) (under state constitutions, most state judges are directly accountable to the electorate).

2. Although there is a general agreement that the debate over the legitimacy of judicial review has intensified, there is no consensus over why it is occurring now. Some see it as a response to the activism of the Warren Court. *See, e.g.*, Benedict, *To Secure These Rights: Rights, Democracy, and Judicial Review in Anglo-American Constitutional Heritage*, 42 Ohio St. L. J. 69, 69 (1981). Other commentators link the controversy over judicial review to specific decisions, most notably Roe v. Wade, 410 U.S. 113 (1973). *See, e.g.*, Meeks, *Foreward*, 42 Ohio St. L. J. 1, 2 (1981). Still others see the current debate as the continuation of a controversy that has been under way for years. *See, e.g.*, Berns, *Judicial Review and the Rights and Laws of Nature*, 1982 Sup. Ct. Rev. 49.

3. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693 (1976).

4. *See* R. Berger, *supra* note 3, at 410 (arguing that "[r]espect for the limits on [judicial] power are the essence of a democratic society"); Bork, *supra* note 3, at 6 (noting that "a court that makes rather than implements value choices cannot be squared with the propositions of a democratic society"); Rehnquist, *supra* note 3, at 695–696 (noting that "the ideal of judicial review has basically antidemocratic and antimajoritarian facets that must be justified in this nation"); *see also* Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 Wayne L. Rev. 1, 7 (1981); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 Sup. Ct. Rev. 1, 28.

5. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* vii (1980) (claiming that his theory "is consistent with . . . the underlying democratic assumptions of our system"); M. Perry, *The Constitution, The Courts, and Human Rights* 10 (1982) (task is to accept the principle of electorally accountable policymaking and to defend judicial review as consistent with it.); Choper, *supra* note 1; Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. Pa. L. Rev. 810, 815 (1974) ("[T]he procedure of judicial review is in conflict with the fundamental principle of democracy—majority rule under conditions of political freedom").

6. *See, e.g., Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. Rev. 259 (1981); *Interpretation Symposium*, 58 S. Cal. L. Rev. 1 (1985); *Judicial Review and the Constitution—The Text and Beyond*, 8 U. Dayton L. Rev. 443 (1983); *Judicial Review versus Democracy*, 42 Ohio St. L. Rev. 1 (1981).

7. *See* Grey, *Do We Have an Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975) (describing distinction between these two models of constitutional interpretation). *See also* J. Ely, *supra* note 5, 1–14; M. Perry, *supra* note 5, at 1; Saphire, *Judicial Review in the Name of the Constitution*, 8 U. Dayton L. Rev. 745–746 (1983) (articulating issue in terms of a choice between originalism [interpretivism] and nonoriginalism [noninterpretivism]).

8. *See* Bork, *supra* note 3, at 8–9 (claiming that the constitutional protection of privacy cannot be justified under an originalist approach). For notable decisions protecting privacy, *see* Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

9. M. Perry, *supra* note 5, at 2.

10. *See* Trimble v. Gordon, 430 U.S. 762, 777–786 (1977) (Rehnquist, J., dissenting)

(arguing that the Fourteenth Amendment was intended only to protect racial minorities). For notable decisions that use the Fourteenth Amendment to prevent gender discrimination, *see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976); Reed v. Reed, 404 U.S. 71 (1971).

11. *See* Kurland, *The Irrelevance of the Constitution: The First Amendment's Freedom of Speech and Freedom of Press Clauses*, 29 Drake L. Rev. 1, 12 (1979) (virtually all recent First Amendment decisions go beyond the Framers' intent).

12. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding*, 2 Stan. L. Rev. 5 (1949) (arguing that the Framers of the Fourteenth Amendment did not intend to apply the Bill of Rights to the states).

13. Even most nonoriginalists tend to agree that few recent Supreme Court cases protecting individual liberties can be justified under an originalist approach. *See, e.g.*, J. Choper, *supra* note 1, at 137; M. Perry, *supra* note 5, at 2.

14. M. Perry, *supra* note 5, at 9.

15. The very title of Ely's book, *Democracy and Distrust*, reflects his goal of trying to reconcile judicial review with democratic theory. See also J. Ely, *supra* note 5, at 5 (observing that representative democracy always has been accepted as a core aspect of the American system of government).

16. *Id.*, at 7.

17. Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 72 Georgetown L. J. 1665, 1666 n. 4 (1984).

18. Richard Saphire observed that "most theorists accept, as a general proposition, that in our democracy the development and implementation of public policy is entrusted to institutions and individuals who are accountable to the electorate." Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contributions to Constitutional Theory*, 81 Mich. L. Rev. 781, 783 n.6 (1983).

19. M. Perry, *supra* note 5, at 4 (quoting J. Pennock, *Democratic Political Theory* 7 [1979]).

20. For example, sometimes in the literature *majority rule* refers to a requirement that decisions be made by the majority, sometimes it refers to a requirement that decisions be made by officials who are electorally accountable, and sometimes it refers to a requirement that decisions be subject to control by electorally accountable officials. Each of these definitions requires a great deal of elaboration. For instance, under the latter definition, what degree of control is sufficient to meet the requirements of majority rule? The key point is that there are countless different ways of defining *democracy* and *majority rule*, and the definition chosen must be explained and justified. *See* M. Edleman, *Democratic Theories and the Constitution* 5, 7 (1984) ("[T]here is considerable disagreement about what democracy means and implies," and there is no one correct definition).

For excellent discussions of the meaning of the term *democracy* in the political science literature, *see, e.g.*, H. Ball, *Courts and Politics* (1980); E. Edelman, *supra* note 20; H. Mayo, *An Introduction to Democratic Theory* (1960); W. Nelson, *On Justifying Democracy* (1980); A. Ross, *Why Democracy?* (1952); C. Ryn, *Democracy and the Ethical Life* (1977).

21. *See, e.g.*, A. Bickel, *The Least Dangerous Branch* 16–17 (1962); Mace, *The Antidemocratic Character of Judicial Review*, 60 Calif. L. Rev. 1140, 1145 (1972); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 Hastings L. J. 957, 958 (1979).

22. A Bickel, *supra* note 21, at 16–20.

23. Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063 (1981) ("[t]he controversy over the legitimacy of judicial review in a democratic polity . . . [is] the historic obsession of constitutional law scholarship"); Attanasio, *supra* note 17, at 1669 ("American lawyers have been obsessed by arguments over the validity of the Supreme Court's counter-majoritarian power").

24. Berger, *Ely's Theory of Judicial Review*, 42 Ohio St. L. J. 87, 87 (1981).

25. Bork, *supra* note 3, at 6. Justice Rehnquist expresses similar sentiments: "How can government by the elected representatives of the people coexist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?" Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).

26. Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 Minn. L. Rev. 587, 619 (1985).

27. M. Perry, *supra* note 5, at 10.

28. J. Ely, *supra* note 5, at 75–104.

29. M. Perry, *supra* note 5, at 126–138.

30. *Id.*, at 9, 10.

31. M. Edelman, *supra* note 20, at 5, 7.

32. 319 U.S. 624, 638 (1943).

33. Webster's Third New International Dictionary 600 (1966).

34. *See, e.g.*, W. Nelson, *On Justifying Democracy 94–129 (1980); H. Mayo, supra* note 20, at 218–241; A. Rossa, supra note 20, at 96–108; C. Ryn. *supra* note 20, at 16–65.

35. H. Arendt, *On Revolution* 143 (1977 ed.).

36. 1 M. Farrand, *The Records of the Federal Convention of 1787* 48 (1937 ed.).

37. Richards, *Interpretation and Historiography*, 56 S. Cal. L. Rev. 489, 511 (1985) (quoting *The Federalist No. 10* [J. Madison]); M. Edelman, *supra* note 20, at 15.

38. R. Dahl, *A Preface to Democratic Theory* 35 (1956).

39. Choper, *supra* note 5, at 810, 821 (senators representing 15 percent of the population can thwart the will of senators representing 85 percent of the people).

40. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

41. *See, e.g.*, Harper v. Board of Elections, 383 U.S. 663, 669 (1966); United States v. Classic, 313 U.S. 299, 315–316 (1941); Home Building and Loan Assn. v. Blaisdell, 290 U.S. 398 (1934); Weems v. United States, 217 U.S. 349, 373 (1910); Cohens v. Va., 19 U.S. (6 Wheat.) 264, 387 (1821); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798) (decisions containing open recognition of their nonoriginalist methodology).

42. *See, e.g.*, J. Choper, *supra* note 1, at 29–46. In fact, as Brilmayer points out, even a legislature that applies the Constitution acts in a countermajoritarian fashion: "Where there is a written constitution, some measure of countermajoritarianism is positively desirable. And in seeking to limit judicial contradiction of majority will, proponents of judicial restraint are relying upon an irrelevant fact, namely, the fact that federal judges do not run for office. This fact is irrelevant because if legislatures seriously fulfill their responsibilities to consider whether their activities are constitutional, they also risk behaving in a countermajoritarian fashion." Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Cases or Controversies" Requirement*, 93 Harv. L. Rev. 297, 304 (1979).

43. There are attempts by some political theorists to defend procedural definitions of

democracy. *See, e.g.*, B. Barry, *Is Democracy Special?* in *Philosophy, Politics and Society* (Fifth Series) 155, (P. Laslett & J. Fishkin eds. 1979) ("I follow . . . those who insist that 'democracy' is to be understood in procedural terms. That is to say, I reject the notion that one should build into democracy any constraints on the substantive outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law"). However, in the debate over constitutional interpretation, complete majoritarian decision making has been assumed to be desirable, not established as normatively or descriptively correct.

44. H. Mayo, *supra* note 20, at 218–241.

45. *Id.*, at 228–230, 237–241.

46. *See, e.g.*, A. Ross, *supra* note 20, at 96–108; C. Ryn, *supra* note 20, at 160–65.

47. A. Bickel, *supra* note 21, at 18 (labeling judicial review a "deviant institution in American government"); *see also* H. Commager, *Majority Rule and Minority Rights* 56 (1943) (describing judicial review as a "drag . . . upon democracy").

48. R. Dahl, *supra* note 38, at 34–62 (democracy does not require majority rule for all purposes); *Commentary*, 56 N.Y.U. L. Rev. 525, 536 (1981) ("There is nothing in the Constitution that elevates principles of majoritarianism above other rights-bearing principles with which that document is laced").

49. *See, e.g.*, R. Harris, *The Quest for Equality: The Constitution, Congress, and the Supreme Court* (1960); H. L. A. Hart, *The Concept of Law* (1961); *but see* Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982).

50. *See, e.g.*, R. Dworkin, *Taking Rights Seriously* (1977).

51. *See, e.g.*, L. Fisher, *The President and Congress* (1972); R. Neustadt, *Presidential Power* (1960); E. Corwin, *The President Office and Power* (rth ed. 1957).

52. If the definition of democracy includes substantive values, such as freedom of speech and equality, then judicial review enhances democracy by protecting these values.

53. By this view, the overall goal is "good government," and democracy (defined as majority rule) is one characteristic of good government; equality, rights, separation of powers are others.

54. *See* discussion accompanying notes 14–27, *supra*.

55. It might be argued that if democracy is defined as including substantive values then we would lack a vocabulary for discussing conflicts between democracy and these other values. This is not a problem, however, because the discussion would focus on the conflict between aspects of democracy, such as the frequently identified conflict between majority rule and minority rights.

56. M, Perry, *supra* note 5, at 93.

57. *Id.*, at 98–99, 101–114.

58. *Id.*, at 126. The Constitution provides that the Supreme Court "shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make." U.S. Const. art. III, §2. The Constitution also provides for congressional discretion to "ordain and establish" lower federal courts. *Id.*, at §1. Apparently, "the decision with respect to the inferior federal courts . . . of defining their jurisdiction . . . was left to the discretion of Congress." Palmore v. United States, 411 U.S. 389, 401 (1973). *But see* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816) (Justice Story's view that "the whole judicial power of the United States should be, at all times, vested in either original or appellate form, in some [federal] courts").

59. M. Perry, *supra* note 5, at 138. Charles Black advances a similar theory: that activist judicial review is consistent with democratic theory because of congressional

power to limit the jurisdiction of federal courts. C. Black, *Decision According to Law* 17–19, 37–39 (1981).

60. Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 Judicature 185, 187 (1981) ("Removal of court jurisdiction over specific subject matter does not repair any damage. The simple fact is that withdrawing the Supreme Court's jurisdiction over school prayer does not return prayer to the schools. Withdrawing court jurisdiction over abortion does not outlaw abortion").

61. *See, e.g.*, S. 158, 97th Cong., 1st Sess. (1981); H. R. 3225, 97th Cong, 1st Sess. (1981) (bills restricting federal court jurisdiction over abortion cases).

62. *See, e.g.*, S. 481, 97th Cong., 1st Sess. (1981); H. R. 327, 97th Cong., 1st Sess. (1981) (bills restricting federal court jurisdiction over cases that involve voluntary school prayers).

63. *See* Cooper v. Aaron, 358 U.S. 1, 18 (1958) (Supreme Court decisions state "the supreme law of the land" and state officials are obligated to follow them); Grano, *supra* note 4, at 42 ("If state officials behave lawfully—if they adhere to their oath to support the Constitution—they will still be bound by the Court's decisions, which would remain the law of the land").

64. *See* Kay, *supra* note 60, at 187; Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006–1007 (1965) ("[t]he jurisdictional withdrawal might work to freeze the very doctrines that had prompted its enactment").

65. *See* Kay, *supra* note 60, at 188 ("The end result of [the] . . . proposals is that constitutional protections become illusory. . . . The protections of the Constitution will only be what 51 percent of the House and 51 percent of the Senate say they are").

66. M. Perry, *supra* note 5, at 130–131. Although Perry argues that there is a difference between restricting jurisdiction and reversing decisions—*id.*, at 136—the *effect* of each is the same. Majority rule is achieved only if laws are enacted that violate the Supreme Court's interpretation of the Constitution. In fact, Congress enacts restrictions on jurisdiction with the goal of changing the substantive law. *See* Alexander, *Painting without the Numbers: Noninterpretive Judicial Review*, 8 U. Dayton L. Rev. 447, 456–457 (1983) ("There is very little difference between legislative overrules of judicial decisions and legislative withdrawals of jurisdiction").

67. As Sager observes: "If Congress enacts a selective jurisdictional restriction for cases that concern state conduct, it will be issuing an open, unambiguous invitation to state and local officials to engage in the conduct that the Supreme Court has explicitly held unconstitutional. . . . If, for example, Congress were to enact legislation insulating 'voluntary' school prayers from federal judicial scrutiny, there would inevitably be an epidemic of school prayer programs." Sager, *Foreward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 69 (1981).

68. *See* Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of Federal Court*, 16 Harv. Civ. Rights-Civ. Lib. L. Rev. 129, 129–30 (1981) (goal of jurisdictional restrictions is the "de facto reversal, by means far less burdensome than those required of a constitutional amendment, of several highly controversial Supreme Court rulings dealing with such matters as abortion, school prayer, and busing").

69. *See* Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157, 158 (1960) (noting that with a jurisdiction-limiting statute,

Congress "can all but destroy the coordinate judicial branch and upset the delicately posed constitutional system of checks and balances").

70. 5 U.S. (1 Cranch) 137 (1803).

71. On numerous occasions, the Supreme Court has declared that the central purpose of judicial review is to ensure that the states uniformly follow federal law, including the Constitution. *See, e.g.*, Dodge v. Woosley, 59 U.S. (How.) 331, 335 (1855); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 386–387 (1821). As the Supreme Court declared: "Thirteen independent courts . . . of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed." Cohens v. Virginia, 19 U.S., at 415–416 (quoting *The Federalist No. 80* [A. Hamilton]).

72. M. Perry, *supra* note 5, at 130–134. Subsequently, Perry has written that if Congress has the power to restrict federal court jurisdiction, this power will extend to precluding review of originalist as well as nonoriginalist decisions. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 551, 580n. 89 (1985).

73. M. Perry, *supra* note 5, at 2 (Almost all modern constitutional decisions are non-originalist).

74. Perry admits this in a subsequent article, admitting that the power to restrict jurisdiction applies in both originalist and nonoriginalist cases. Perry, *supra* note 72, at 580n. 89.

75. *See* Alexander, *supra* note 66, at 453; Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. Dayton L. Rev. 579, 609 (1983).

76. Sager, *supra* note 67, at 39; *see also* Burt, *Constitutional Law and the Teaching of the Parables*, 93 Yale L. J. 455, 484–485n. 93 (1984) ("Perry finds himself caught in a contradiction between his conception of moral leadership for judges and the apparently superior authoritative claims of majoritarian institutions"); Wellington, *History and Morals in Constitutional Adjudication* (Book Review), 97 Harv. L. Rev. 326, 328 (1983) ("But what kind of dialogue is it when one participant can silence the other by cutting out his tongue when offended by his words?").

77. *See* M. Perry, *supra* note 5, at 134. Arguably, Congress has never completely restricted federal court review because even in *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), the primary example of congressional power under the exceptions clause, the plaintiff had other avenues of access to the federal courts. M. Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 18 (1980).

78. In 1981, for example, 18 proposals were introduced in Congress to restrict federal court jurisdiction. *See* Tribe, *supra* note 68, at 129. "In the fifteen years between 1953 and 1968, over sixty bills were introduced in Congress to eliminate the jurisdiction of the federal courts over a variety of specific subjects; none of these became law." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart and Wechsler's the Federal Courts and the Federal System* 360 (2d ed. 1973).

79. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 Dayton L. Rev. 809, 813 (1983).

80. *See, e.g.*, M. Redish, *supra* note 77; Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 Yale L. J. 498 (1974); Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953); Ratner, *supra* note 69; Sager, *supra* note 67.

81. J. Ely, *supra* note 5, at 87.

82. *See id.*, at 75.

83. *Id.*, at 87. Ely argues that the Court should protect participational values because those are the ones which the Constitution is preeminently concerned with. Their protection reinforces democracy, and the Court has special expertise as to questions of process. *Id.*, at 75 n.*. Ely argues that this theory is the underlying concept expressed in the famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152–153n.4 (1938). *See* J. Ely, *supra* note 5, at 75–77.

84. J. Ely, *supra* note 5, at 88. Tribe explains why Ely's theory is so appealing: "It is easy to see why the courts would be attracted to this way of describing the content and role of constitutional law. Such an account permits courts to perceive and portray themselves as servants of democracy even as they strike down the actions of supposedly democratic governments." Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063, 1063 (1980).

85. J. Ely, *supra* note 5, at 87–88.

86. As Tribe points out: "Religious freedom, antislavery, private property: much of our constitutional history can be written by reference to just these social institutions and substantive values. That the Constitution has long addressed such matters, and often with beneficial effect, ought to surprise no one. What is puzzling is that anyone can say, in the face of this reality, that the Constitution is or should be predominately concerned with *process* and not *substance*." Tribe, *supra* note 84, at 1067 (emphasis in original).

87. Ely argues that the right to travel would be upheld under a process model because a person should have the ability to leave an incompatible majority. J. Ely, *supra* note 5, at 179.

88. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) ("[W]e have no occasion to ascribe the source of this right [to travel.]"); United States v. Guest, 383 U.S. 745, 758 (1966) ("that right finds no explicit mention in the Constitution").

89. Roe v. Wade, 410 U.S. 113 (1973) (striking down Texas statute forbidding abortion as violating Fourteenth Amendment).

90. J. Ely, *supra* note 5, at 247n. 52; Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L. J. 920 (1973).

91. According to Ely, the Constitution is based on the "quite sensible assumption that an effective majority will not inordinately threaten its own rights, and . . . [seeks] to assure that such a majority will not systematically treat others less well than it treats itself." J. Ely, *supra* note 5, at 100–101.

92. This argument and its flaws are outlined in Chemerinsky, *Rationalizing the Abortion Debate: Legal Rhetoric and the Abortion Controversy*, 31 Buffalo L. Rev. 107, 117–122, 138–139 (1982).

93. Cox, *Book Review*, 94 Harv. L. Rev. 700, 710–711 (1981); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 515–516 (1981) (arguing that Ely's theory could be used to justify creating a right to legalized abortions). Frank Michelman argues that Ely's theory can justify judicial action guaranteeing all citizens a right to basic entitlements, an action likely to be regarded as the height of judicial activism. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L. Q. 659, 674–680.

94. J. Ely, *supra* note 5, at 73–104.

95. *See* Tribe, *supra* note 84, at 1069–1070.

96. *See, e.g.*, Abbate v. Mundt, 403 U.S. 182 (1971) (sustaining deviations from mathematical equality by a range of up to 11.9 percent); Reynolds v. Sims, 377 U.S. 533, 579–580 (1964) (describing instances in which deviations from one person/one vote are

permissible); Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (holding that approval in a popular referendum cannot sustain impermissible malapportionment).

97. *See* Eistreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open-Texture*, 56 N.Y.U. L. Rev. 547, 565 (1981) (judicial review of voting procedures requires imposition of substantive values).

98. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring appointment of counsel for every indigent accused of a felony).

99. Miranda v. Arizona, 384 U.S. 436 (1966).

100. J. Ely, *supra* note 5, at 124–125.

101. *Id.*, at 75, 103.

102. J. Choper, *supra* note 1, at 9–10.

103. *See* Eistreicher, *supra* note 97, at 575 ("No . . . claim can be made that judicial intervention in support of minority groups is necessarily consistent with, or particularly supportive of, representative democracy").

104. For example, Ely's theory of "virtual representation"—J. Ely, *supra* note 5, at 82–87, 100–101—adds a new element to the definition of democracy because it requires effective representation of all groups in society. While I agree with this addition to the definition, it nevertheless is a limitation on the principle of majority rule with which Ely begins; it replaces the strictly procedural definition of democracy with a substantive one.

105. *See* Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982). Although a number of commentators have challenged Westen's conclusion that the concept of equality should be banned from legal or moral discourse—*id.*, at 542—none of them has challenged his premise that all discussions of equality require the use of other substantive values. *See* Burton, *Comment on 'Empty Ideas': Logical Positivist Analysis of Equality and Rules*, 91 Yale L. J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 Mich. L. Rev. 575 (1983); D'Amato, *Is Equality a Totally Empty Idea?* 81 Mich. L. Rev. 600 (1983).

106. J. Ely, *supra* note 5, at 256 n. 92; *see also* M. Perry, *supra* note 5, at 153 (determining whether distinctions are the result of prejudice or legitimate differences require substantive judgments).

107. *See* Baker, *Neutrality, Process and Rationality: Flawed Interpretations of Equal Protection*, 58 Texas L. Rev. 1029, 1041 (1980); Tribe, *supra* note 84, at 1076. All who challenge a law arguably constitute a minority that opposes a decision by the majority. *See* J. Choper, *supra* note 1, at 76. The courts need substantive criteria to determine which minorities deserve judicial protection.

108. *See* discussion accompanying notes 110–131, *infra* (all theories seeking to reconcile majority rule and judicial review fail).

109. As Maltz remarks: "[T]he exercise of judicial review is fundamentally inconsistent with the practice of electorally accountable government. This fact does not condemn the practice; one can still argue that the abandonment of democratic principles leads to a better governed nation. But unless one is willing to forthrightly take this position, any defense of noninterpretive review is doomed to failure." Maltz, *Murder in the Cathedral: The Supreme Court as Moral Prophet*, 8 U. Dayton L. Rev. 623, 631 (1983); *see also* Burt, *supra* note 76, at 485 n. 93 (Perry's "basic error is in seeking to legitimize judicial review by identifying principles for hierarchically ranking the relative authority of judicial and majoritarian institutions. He has distinguished company in this regard; it has been the dominant theme of constitutional law scholarship at least since James Bradley Thayer"); Brest, *supra* note 23, at 1063.

110. *See, e.g.*, R. Berger, *supra* note 3; Bork, *supra* note 3; Rehnquist, *supra* note 3.

111. 5 U.S. (1 Cranch) 137 (1803).

112. The inherent ambiguity of history as a basis for constitutional interpretation is discussed in Chapter 3, text accompanying notes 26–37, *infra*.

113. *See* H. L. A. Hart, *The Concept of Law* 125 (1961); H. Kelman, *The Pure Theory of Law* 349 (1970) ("Even the most detailed command must leave to the individual executing the command some discretion. Hence every law-applying act is only partly determined by the law and partly undetermined"). The inherent discretion in decision making is discussed in Chapters 3 and 6, *infra*.

114. Saphire, *supra* note 7, at 765 (presenting the originalist argument, attributed to Raoul Berger, that the Framers' intent should be followed because the Framers intended that it be followed).

115. A. Bickel, *supra* note 21, at 1; *see also* Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 Ohio St. L. J. 261, 266 (1981) (The text of the Constitution is equivocal even with regard to originalist judicial review).

116. *See, e.g.*, J. Choper, *supra* note 1, at 423 nn. 7–8; 2 W. Crosskey, *Politics and the Constitution in the History of the United States* 1008–1046 (1953) (arguing that the Framers did not intend judicial review); Monaghan, *The Constitution Goes to Harvard*, 13 Harv. Civ. Rights-Civ. Lib. L. Rev. 117, 125 (1978) (noting that it is "increasingly doubtful that any conclusive case can be made one way or the other. It is an understatement to say that the Framers lacked clarity in their thinking").

117. M. Perry, *supra* note 5, at 74; Jesse Choper observes that "[w]hatever indications may be gleaned from intention or text on the issue of whether the Court should possess the power of judicial review, these sources afford virtually no assistance whatever on the related question of the form and scope of judicial review; or whether . . . the Court should assume a stance of activism or restraint." Choper, *supra* note 1, at 423, n. 7–8.

118. Kay, *Preconstitutional Rules*, 42 Ohio St. L. J. 187, 193 n. 22 (1981) ("It is anomalous to argue . . . that recourse to the intention of the Framers of the Constitution is required . . . [as] demonstrated from a review of the Framers' intention"); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 383 n. 177 (1981).

119. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603, 645 (1985). In Chapter 4, I develop the contention that a normative theory must be developed to justify any method of interpretation, including originalism. *See* Chapter 4, text accompanying notes 11–47, *infra*.

120. Judge Learned Hand wrote this famous phrase: "For myself it would be most irksome to be ruled by a bevy of Platonic guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, *The Bill of Rights* 73 (1958).

121. Larry Alexander states this well: "Why should the framers, but not the Supreme Court, have the authority to bind us to value judgments not endorsed by contemporary political bodies?" Alexander, *supra* note 66, at 454 n. 29.

122. *See, e.g.*, Bork, *supra* note 3, at 3 ("Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities, by the Constitution"); Lupu, *supra* note 75, at 590 ("Interpretivists, echoing Hamilton in the Federalist Papers, argue that the consent requirements are satisfied in the exercise of judicial review on grounds of enforcement of values which 'the people' have enshrined in the constitutional text").

123. Lerner, *The Constitution and Court as Symbols*, 46 Yale L. J. 1290, 1296 (1937).

124. Paul Brest writes: "Even if the adopters freely consented to the Constitution . . . this is not an adequate basis for continuing fidelity to the founding document, for their consent cannot bind subsequent generations. We did not adopt the Constitution and those who did are dead and gone." Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. Rev. 204, 225 (1980).

125. The ratification of a constitutional amendment requires approval from two thirds of both houses of Congress and three quarters of the states. U.S. Const. art. V.

126. Maltz, *Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory*, 63 B. U. L. Rev. 811, 821–822 (1983). (emphasis omitted).

127. Levy, *Judicial Review, History and Democracy: An Introduction*, in *Judicial Review and the Supreme Court* 1, 12 (L. Levy ed. 1967) (people implicitly consented to the Constitution by not changing it); Choper, *supra* note 5, at 810, 848 (implicit consent to judicial review).

128. Brest, *supra* note 124, at 236 ("If inaction can be taken as tacit consent to anything—a problematic assumption in any case—it is to the Court's decisions, including its nonoriginalist decisions").

129. Constitutional amendments have overturned Supreme Court decisions on only four occasions. The Eleventh Amendment overturned the holding of Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); the Fourteenth Amendment overturned, in part, the holding in Scott v. Sandford, 60 U.S. (19 How.) 393 (1856); the Sixteenth Amendment overturned the holding in Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); and the Twenty-sixth Amendment overturned Oregon v. Mitchell, 400 U.S. 112 (1970).

130. 5 U.S. (1 Cranch) 137 (1803).

131. For example, Grano, a contemporary originalist, argues that without judicial review there would be "constitutional anarchy." Grano, *supra* note 4, at 5.

132. Bork, *supra* note 3, at 7.

133. Van Alstyne, *Interpreting this Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209, 229 (1983).

134. In Chapter 5, I discuss how constitutional issues are left to the political process under the political question doctrine and the generalized grievance standing doctrine. *See* Chapter 5, text accompanying notes 75–89, *infra*.

135. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996, 1003 (1979) (mem.) (plurality opinion concluding that the constituionality of a president's rescission of a treaty is a political question); A. D'Amato & R. O'Neill, *The Judiciary and Vietnam* 51–58 (1972) (description of cases dealing with challenges to the constitutionality of the Vietnam War and the political question doctrine); Tigar, *Judicial Power, the Political Question Doctrine, and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135, 1142 (1970).

136. For a discussion of the importance of the recognition power, *see* H. Finer, *The Presidency: Crisis and Regeneration* 91 (1960).

137. The Supreme Court described the relationship between removal and Johnson's impeachment in Myers v. United States, 272 U.S. 52 (1926); *see also* Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353 (1927).

138. United States v. Nixon, 418 U.S. 683 (1974); for a discussion of the importance of the release of the tapes in Nixon's decision to resign, *see* T. White, *Breach of Faith* (1975).

CHAPTER 2

1. Some scholars use a much more specific definition of *interpretation* that includes a stipulation of the proper interpretive methodology. For example, Walter Benn Michaels defines *interpretation* as a process of determining the intent of the author. Michaels writes: "I want to argue that any interpretation of the Constitution that really is an interpretation of the Constitution is always and only an interpretation of what the Constitution originally meant." Michaels, *A Response to Perry and Simon*, 58 S. Cal. L. Rev. 673, 673 (1985); *see also* Michaels, *Against Formalism*, in *The State of the Language* 410–420 (L. Michaels & C. Ricks eds. 1980).

I reject Michaels' definition of *interpretation* because it begs the key methodological question of how decision makers should give meaning to a text. In the first section of Chapter 4 I respond to Michaels directly and argue that there the term *interpretation* does not inherently require any particular approach; that the debate between originalism and nonoriginalism cannot be won by stipulation. *See* Chapter 4, text accompanying notes 11–37, *infra*.

2. Larry Simon states this question and explains its importance in Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603 (1985).

3. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 383–384 (1981) (emphasis omitted).

4. Religious texts are obeyed because they are believed to communicate God's will, and interpretation is a process of applying God's instructions to particular situations. *See generally* Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 S. Cal. L. Rev. 237 (1985).

5. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 Cal. L. Rev. 1482 (1985).

6. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. §§2000a–2000h (1982) (prohibiting discrimination in public accommodations, education, and employment).

7. For example, tort law is developing to protect employees against wrongful termination by their employers. *See* Klare, *The Public/Private Distinction in Labor Law*, 130 U. Pa. L. Rev. 1358, 1362–1363 (1982); Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?* 130 U. Pa. L. Rev. 1441, 1481 n. 143 (1982) (citing to cases limiting wrongful terminations).

8. Legislatures could enact laws that contain provisions making their change more difficult in the future. For example, a law might stipulate that it can be overridden only by a two-thirds vote of a future legislature. In this way, a statute resembles a constitution. It also poses questions similar to those raised about constitutions, such as, What authority does this legislature have to bind future legislatures?

9. *See, e.g.*, Lerner, *Constitution and Court as Symbols*, 46 Yale L. J. 1290, 1296 (1937); A. Miller, *Democratic Dictatorship* 41 (1981) (the Constitution as a "sacred document").

10. *See* Attanasio, *Everyman's Constitutional Law: A Theory of the Power of Judicial Review*, 72 Geo. L. J. 1665, 1711 (1984); Lerner, *supra* note 9, at 1295–1296; Schechter, *The Early History of the Tradition of the Constitution*, 9 Am. Pol. Sci. Rev. 707 (1915).

11. L. Tribe, *American Constitutional Law* 9 (1978).

12. G. Wood, *The Creation of the American Republic, 1776–1787* 379 (1969).

13. *See, e.g.*, Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 861 (1985); L. Levy, *Judgments: Essays on American Constitutional History* 5–13 (1972); F. McDonald, *A Constitutional History of the United States* (1982) (describing desire for a separation of powers and for a constitution as a way of limiting the possibility of despotic rule).

14. *See, e.g.*, 1, 2 W. Crosskey, *Politics and the Constitution in the History of the United States* (1953); J. Fiske, *The Critical Period of American History* (1916); A. Kelly & W. Harbison, *The American Constitution: Its Origin and Development* 97, 103–104 (1976); H. P. Hood & Co. v. DuMond, 336 U.S. 525 (1949) (describing economic events that led to the drafting of the Constitution).

15. The Declaration of Independence cites these as among the abuses by the king of England against the colonists. *See* H. Lee, *The Story of the Constitution* 123–124 (1932) (describing abuses of bills of attainder and ex post facto clause).

16. *See* C. Miller, *The Supreme Court and the Uses of History* 45–46 (1969); Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934) (describing purpose behind the contract clause).

17. *See* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 435–620 (1971) (describing opposition to ratification of the Constitution based on the absence of a Bill of Rights); F. McDonald, *supra* note 13.

18. *See* C. Beard, *An Economic Interpretation of the Constitution of the United States* (1929); *see also* R. Brown, *Charles Beard and the Constitution: A Critical Analysis of 'An Economic Interpretation of the Constitution'* (1956).

19. The analogy to Ulysses and the concept of precommitment are drawn from J. Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (1979). The story of Ulysses is from Homer's *Odyssey, Book XII* (Harper Colophon ed. 1985).

20. J. Elster, *supra* note 19, at 36. Tribe describes the phenomenon of precommitment in different terms, using the "parable of the pigeons." L. Tribe, *supra* note 11, at 10. Tribe describes an experiment in which pigeons acted to foreclose temptation to help their long-term interests. *Id.*, at 10, citing Ainslie, *Impulse Control in Pigeons*, 21 J. Exper. Ann. Behav. 485 (1974) ("Pigeons seem capable of learning to bind their 'own future freedom of choice' in order to reap the rewards of acting in ways that would elude them under the pressures of the moment"). Tribe explains how the Constitution can be understood as a mechanism to insulate some matters from majoritarian pressures. L. Tribe, *supra* note 11, at 10.

21. J. Elster, *supra* note 19, at 37.

22. *See, e.g.*, Schenck v. United States, 249 U.S. 47 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919) (convictions for speech activities during World War I); Dennis v. United States, 341 U.S. 494 (1951); Scales v. United States, 367 U.S. 203 (1961) (convictions for speech activities during the McCarthy era).

These examples demonstrate that courts are, at best, an imperfect check against the pressures of the majority. I argue in subsequent chapters that they are the best check society has, although they, too, fail at times.

23. In Chapter 1, I criticized the originalists for justifying their theory by claiming that the people have consented to the text of the Constitution but not to non-originalist decision making. *See* Chapter 1, text accompanying notes 22–26, *supra*. I, therefore, am not arguing that the existence of the Constitution is justified because people now consent to it because, as I argued in Chapter 1, silence cannot be taken as consent to a document that

requires the efforts of a super-majority to bring about change. However, it should be noted that my criticism is not directed at consent theories generally nor am I arguing that it is illegitimate to justify the existence of a Constitution by consent theories. My point is a much more limited one that consent of the majority cannot be established by silence when the majority (defined as 51 percent) would be impotent to bring about change.

24. *See, e.g.*, R. Dworkin, *Taking Rights Seriously* (1977); *cf.*, Moore, *Moral Reality*, 1982 Wis. L. Rev. 1061; Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 277 (1985); M. Perry, *The Constitution, the Courts, and Human Rights* 101–114 (1982) (arguing from a moral realist perspective that there are correct moral values); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221 (1973); Simon, *supra* note 5, at 1505–1508 (describing deep consensus theories of rights).

25. Dworkin, *supra* note 24, at xi.

26. For an excellent argument against rights theories, *see* Tushnet, *An Essay on Rights*, 62 Texas L. Rev. 1363 (1984).

27. For an excellent argument against the existence of the norm of equality, *see* Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982); *see also*, Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 Mich. L. Rev. 575 (1983); Greenawalt, *How Empty is the Idea of Equality?*, 83 Colum. L. Rev. 1167 (1983); Karst, *Why Equality Matters*, 17 Ga. L. Rev. 245 (1983).

28. The fullest exposition of Rawls's theory is found in J. Rawls, *A Theory of Justice* (1971). Other theorists develop social contract theories that also might be used to justify continued governance under a constitution. *See* P. Riley, *Will and Political Legitimacy: A Critical Exposition of Social Contract Theory in Hobbes, Locke, Rousseau, Kant, and Hegel* 8 (1982); J. Simmons, *Moral Principles and Political Obligations* 57 (1979).

29. Rawls, *supra* note 28, at 11–22.

30. *Id.*, at 137–138.

31. *Id.*, at 137 ("Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice").

32. Boynton, *The Season of Fiction Is Over: A Study of the Original Position in John Rawls' A Theory of Justice*, 15 Osgoode Hall L. J. 215, 238 (1977).

33. There is voluminous literature critiquing Rawls. A particularly impressive collection of essays is found in N. Daniels, *Reading Rawls* (1980), including, Nagel, *Rawls on Justice*, at 1–16; Dworkin, *The Original Position*, at 17–19; Fisk, *History and Reason in Rawls' Moral Theory*, at 53–80.

34. Fisk, *supra* note 33, at 53–80.

35. The Critical Legal Studies movement has been instrumental in pointing out how legal thought and doctrine always has ideological presuppositions. For a collection of essays illustrating this, *see* D. Kairys, *The Politics of Law: A Progressive Critique* (1982).

36. For example, Mark Tushnet attacks the liberal premise that the welfare of the individual is the most important concern for society and that individual rights should be the basis for jurisprudence. *See, e.g.*, Tushnet, *supra* note 26.

37. Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 Texas L. Rev. 1207, 1231 (1984).

38. For example, historians have documented that the Framers of the Fourteenth Amendment intentionally wrote the amendment in broad language to enhance its chances of ratification. *See* Kelly, *The Fourteenth Amendment Reconsidered*, 54 Mich. L. Rev. 1049, 1080, 1086 (1956).

39. Simon, *supra* note 2, at 615 ("Studies show that there is broad consensus among Americans on the abstract principles thought to be fundamental values of American society"); C. Elder & R. Cobb, *The Political Uses of Symbols* 119 (1983); D. Devine, *The Political Culture of the United States* 179–230 (1972).

40. Prothro & Grigg, *Fundamental Principles of Democracy: Agreement and Disagreement*, 22 J. Politics 276, 285–286 (1960).

41. H. McCloskey & A. Brill, *Dimensions of Tolerance: What Americans Believe about Civil Liberties* (1983).

42. *Id.*, at 39.

43. *Id.*, at 39.

44. *Id.*, at 39.

45. McCloskey and Brill test their proposition that there is general agreement to the Constitution but no agreement as to specific meanings, with examples from virtually every part of the Bill of Rights. *Id.*, at 136–170 (due process); 171–231 (privacy rights). Other studies confirm the McCloskey and Brill findings. *See, e.g.*, M. Edelman, *Politics as Symbolic Action* 5 (1971); C. Elder & R. Cobb, *supra* note 39, at 119; D. Devine, *supra* note 39, at 179–230.

46. C. Elder & R. Cobb, *supra* note 39, at 33 (describing the distinction between condensation and referential symbols); R. Pranger, *Action, Symbolism and Order* 168–176 (1968) (discussing types of political symbols); *cf.* M. Eliade, *The Two and the One* 20 (1965) (describing religious symbols that convey many different meanings).

47. *See* A. Etzioni, *Modern Organizations* 52 (1964) ("[t]he subjects accept a ruling as justified because it agrees with a set of more abstract rules which they consider legitimate, and from which the ruling is 'derived' ").

48. *See* C. Elder & R. Cobb, *supra* note 39, at 101; D. Easton, *A Systems Analysis of Political Life* 300 (1965); A. Miller, *Social Change and Fundamental Law: America's Evolving Constitution* 349 (1979) (Constitution as preserving fundamental values in times of social stress). *But see* Levinson, *The Constitution in American Civil Religion*, 1979 Sup. Ct. Rev. 123 (arguing that the Constitution's ambiguity might undercut its unifying function).

49. Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 3 (1984).

50. Attanasio, *supra* note 10, at 1711; *see also* A. Miller, *supra* note 9, at 41–43.

51. Lerner, *supra* note 9, at 1295–1296, 1298.

52. R. Williams, *American Society: A Sociological Interpretation* (1951), quoted in Levinson, *supra* note 48, at 124.

53. *See* D. Beetham, *Max Weber and the Theory of Modern Politics* 122 (1974).

54. *Id.*, at 122.

55. *See, e.g.*, Levinson, *supra* note 48, at 125; Lerner, *supra* note 9, at 1295; Grey, *supra* note 49, at 3 (describing the Constitution as a source of national unity); Loewenstein, *The Value of Constitutions in Our Revolutionary Age*, in *Constitutions and Constitutional Trends Since World War II* (A. Zurcher ed.) 220 (1951) (symbolic value of constitutions).

56. L. Tribe, *Constitutional Choices* 26 (1985).

57. *Developments in the Law: The Interpretation of State Constitutions*, 95 Harv. L. Rev. 1324, 1353, 1355 (1982); P. Kauper, *The State Constitution: Its Nature and Purpose* 13 (1971).

58. *Development in the Law*, *supra* note 57, at 1353 (frequency of amendment of state constitutions); E. Cornwell, *State Constitutional Conventions* 5 (1975) (frequency of amendment and "wholesale" revisions of state constitutions); A. Sturm, *The Development*

of American State Constitutions, 12 Publius 57, 58–59, 75–76 (1982) (frequency of total revisions of state constitutions).

59. L. Tribe, *supra* note 56, at 289 n. 43. Nor is this a new point. *See* Long, *Tinkering with the Constitution*, 24 Yale L. J. 573 (1915): "The federal constitution has so far been a fairly stable document. It has never been revised as a whole, and has been changed by amendment in only a few particulars. It has happily escaped the fate that has befallen the constitutions of the states. Not only are they subject to constant change, but they have long since ceased to be constitutions in a true sense. Instead of embodying broad general propositions of fundamental permanent law, they now exhibit the prolixity of a code and consist largely of mere legislation. No one now entertains any respect for a state constitution. It has little more dignity than an ordinary act of the legislature."

60. I. Duchacek, *Power Maps: Comparative Politics of Constitutions* 5 (1973) ("[A] constitution is a chart of channels and courses open to political authorities for identifying and solving the major problems and stresses which confront their national community"); Casper, *Guardians of the Constitution*, 53 S. Cal. L. Rev. 773, 779 (1980) (use of constitutional principles in times of "social, psychological, and cultural strain").

61. *See* Bruff, *Legislative Formality, Administrative Rationality*, 63 Texas L. Rev. 207, 216 (1984); R. Axelrod, *The Evolution of Cooperation* 7–10 (1984) (describing the "prisoner's dilemma problem"—that given uncertainty about the conduct of others, individuals will act to benefit themselves to the detriment of others).

62. James M. Buchanan and Gordon Tullock have used public choice theory to explain why a constitution is desirable as a way of restraining individuals acting in their self-interest and of maximizing society's welfare. Their classic book *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962) develops, with economic theory and mathematical proofs, support for my conclusions about the desirability of a constitution as a unifying device.

63. C. Elder & R. Cobb, *supra* note 39, at 118.

64. *See* J. Buchanan & G. Tullock, *supra* note 62, at 81–84 (describing why it is rational to have a constitution).

65. *See, e.g.*, Tushnet, *supra* note 26, at 1371 ("[F]undamental indeterminacy makes it impossible to connect that abstract right . . . to any particular outcome"); Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 181–202 (1981) (discussing problems in interpreting language, including ambiguity, metaphors, vagueness, and open texture); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–415 (1819) (inherent indeterminacy of language).

66. E. McWhinney, *Constitution-Making: Principles, Process, Practice* 9–10 (1981); *see generally* H. L. A. Hart, *The Concept of Law* 125 (1961); H. Kelman, *The Pure Theory of Law* 349 (1970) (inevitability of discretion in applying general rules to particular situations).

67. Undoubtedly, much of current constitutional scholarship has been preoccupied with searching for ways of limiting judicial discretion and finding methods of decision making that yield determinate results in particular cases. In Chapter 6, I argue that this search is futile—that discretion is inherent in constitutional decision making and that no model can provide determinacy.

68. M. Cappelletti & W. Cohen, *Comparative Constitutional Law: Cases and Materials* 11 (1979) (describing constitutionalism as a Western phenomenon); *see* Geck, *Judicial Review of Statutes: A Comparative Survey of Present Institutions and Practices*, 51 Cornell L. Q. 250, 250–251 (1966) (describing increase in number of nations with con-

stitutions since World War II); Friedrich, *The Political Theory of the New Democratic Constitutions*, in *Constitutions and Constitutional Trends Since World War II* 13–35 (A. Zurcher ed. 1955) (increasing number of nations relying on written constitutions to limit government).

69. These certainly are not the only two countries that might be examined. For instance, Canada recently, in 1982, adopted a Charter of Rights, which is closely patterned after the U.S. Bill of Rights. However, it contains a clause that allows Parliament and the provinces to enact legislation exempt from the charter (section 33 permits this). Canada's Charter of Rights is thus a constitution in a very different sense than the U.S. Constitution that has as a primary feature its "entrenchment"—its difficulty of change.

70. *See* Jalowicz, *The Judicial Protection of Fundamental Rights under English Law*, in *The Cambridge—Tilburg Law Lectures* 5 (B. Markesinis & J. Willems eds. 1980): "The United Kingdom, of which England forms a part, has no written constitution and there are no codes. . . . There is no legislative statement of constitutionally protected rights, there is not even much legislative statement of general principle such as is found in a continental code, and it is still rare—it was formerly unknown—for legal reasoning to take as its starting point the right of an individual with a view to deciding whether or not that right has been infringed."

71. A. Dicey, *Introduction to the Study of the Law of the Constitution* 40 (1960); J. Jaconelli, *Enacting a Bill of Rights* 12 (1980); Ackerman & Charney, *Canada at the Constitutional Crossroads*, 34 U. Toronto L. J. 117, 118 (1984).

72. Jalowicz, *Fundamental Guarantees in Civil Litigation: England*, in *Fundamental Guarantees of the Parties in Civil Litigation* 123–124 (M. Cappelletti & D. Talon eds. 1973).

73. *Id.*, at 132; Jalowicz, *supra* note 70, at 5.

74. Jalowicz, *supra* note 72, at 132.

75. A. Dicey, *supra* note 71, at 43.

76. N. Johnson, *In Search of a Constitution: Reflections on State and Society in Britain* 30, 32 (1977).

77. *Id.*, at 197–198; J. Jaconelli, *supra* note 71, at vii. For a discussion of the development of the Canadian Constitution, *see* Ackerman & Charney, *supra* note 71; Schwartz, *General National Agreement: The Legal Sanction for Constitutional Reform in Canada*, 6 Queens L. J. 5132 (1981).

78. N. Johnson, *supra* note 76, at 33, 35.

79. Schwarzschild, *Book Review, Variations on an Enigma: Law in Practice and Law on the Books in the USSR*, 99 Harv. L. Rev. 685, 688 (1986) ("Although the Soviet system is governed by law, its law differs fundamentally from common law and from Western European civil law. Its essential and distinguishing characteristic is that while ordinary citizens and subordinate officials are subject to the law, the state itself is above the law—an unlimited dictatorship").

80. O. Ioffe & P. Maggs, *Soviet Law in Theory and Practice* 2 (1983).

81. W. Butler & P. Maggs, *The Soviet Legal System: Fundamental Principles and Historical Commentary* 89 (3d ed. 1977); *see also* W. Kulski, *The Soviet Regime: Communism in Practice* 144 (1963).

82. W. Butler & P. Maggs, *supra* note 81, at 86–89.

83. Schwarzschild, *supra* note 79, at 689.

84. Soviet Const. of 1977 art. 39, quoted in Schwarzschild, *supra note 79, at 689.*

85. *See* text accompanying notes 39–44, *supra*.

CHAPTER 3

1. T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Powers of the States of the American Union* 124 (Carrington's 8th ed. 1927).

2. South Carolina v. United States, 199 U.S. 437, 448 (1905).

3. 17 U.S. (4 Wheat.) 415 (1819).

4. Bennett, *'Mere Rationality' in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif L. Rev. 1049, 1094 (1979).

5. *See, e.g.*, Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209, 229 (1983) (importance of limiting constitutional decisions to what is clearly required in the text or intended by the Framers).

6. *See, e.g.*, Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 Colum. L. Rev. 1029, 1029 (1977) ("The Constitution has remained vital largely because its provisions have proved adaptable to the changing needs of a developing society"); Sandalow, *Judicial Protection of Minorities*, 75 Mich. L. Rev. 1162, 1185 (1977) (constitutional law understood as the expression of evolving social norms).

7. Sandalow, *Constitutional Interpretation*, 79 Mich. L. Rev. 1033, 1060–1061 (1981) (agreement as to need for mechanism to change the Constitution).

8. I. Duchacek, *Power Maps: Comparative Politics of Constitutions* 210 (1973).

9. *Id.*, at 210.

10. *Id.*, at 210.

11. *Id.*, at 210.

12. *Id.*, at 210 (example of Morocco's constitution, which provides that Islam is the official religion).

13. *See* Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 181–202 (1981) (discussing ambiguity, vagueness, metaphors, and open texture as preventing literal following of language).

14. *See, e.g.*, Levinson, *Law and Literature* 60 Texas L. Rev. 373, 391 (1982); Miller, *The Critic as Host*, 3 Critical Inq. 439 (1977) (inevitable indeterminacy of interpretation).

15. Levinson, *What Do Lawyers Know (and What Do They Do with Their Knowledge)?: Comments on Schauer and Moore*, 58 S. Cal. L. Rev. 441, 449 (1985).

16. S. Fish, *Is There a Text in This Class?* 327 (1980).

17. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–415 (1819).

18. *See, e.g.*, Smith v. California, 361 U.S. 147, 157 (1959) (Black J., concurring).

19. Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739, 743 (1982).

20. U.S. Const. art I, §8. The commerce clause of the Constitution is extremely important in that it is the basis for almost all national economic regulation. From 1887 to 1937, the Supreme Court limited the federal government's regulatory power by narrowly interpreting the commerce clause. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E. C. Knight Co., 156 U.S. 1 (1895). Since 1937 the Supreme Court has interpreted the commerce clause broadly, allowing Congress expansive authority to regulate the economy. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942); Katzenback v. McClung, 379 U.S. 294 (1964).

21. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton R. R., 295 U.S. 330 (1935).

22. *See* 1 W. Crosskey, *Politics and the Constitution in the History of the United States* 51, 74–80 (1953).

23. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

24. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 207 (1980).

25. *See, e.g.*, R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693 (1976).

26. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502, 508–509 (1964).

27. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 17 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 481 (1981) (noting that "we have no fixed concept of a group intention that makes what the Framers intended simply a matter of historical fact").

28. *See, e.g.*, Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. Pol. Econ. 328 (1950); *see also* A. Feldman, *Welfare Economics and Social Choice Theory* 178–195 (1980); *cf.* Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1982) (applying Arrow's Impossibility Theorem to Supreme Court decision making).

29. Dworkin, *supra* note 27, at 477 ("[T]here are no, or very few, relevant collective intentions, or perhaps only collective intentions that are indeterminate rather than decisive one way or the other"); Saphire, *Judicial Review in the Name of the Constitution*, 8 U. Dayton L. Rev. 745, 778 (1983) ("There is no such thing as a concrete and knowable intent of the framers—at least when intent is defined as the collective, conscious, and subjective state of mind of at least a majority of the persons who voted to adopt and ratify the Constitution").

30. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 Hastings Const. L. Q. 257, 267 (1982).

31. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

32. W. Crosskey, *supra* note 22, at 1008–1028.

33. Van Alstyne, *supra* note 5, at 234.

34. R. Collingwood, *The Idea of History* 218–219 (1946); *see also* E. Carr, *What Is History* 16–24 (1964).

35. Florovsky, *The Study of the Past*, in *Ideas of History* 351, 352 (R. Nash ed. 1969).

36. *See* Brest, *supra* note 24; Shaman, *supra* note 30.

37. *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 862 (1985) (ability to have "value-free" interpretation of parts of the Constitution dealing with the structure of government); Grano, *Judicial Review and a Written Constitution in a Demoratic Society*, 28 Wayne L. Rev. 1, 20 (1981) (avoiding subjectivity requires following original intent). In Chapter 6 I more fully argue that discretion and subjectivity are impossible, and in the last section of Chapter 4, I respond specifically to Carter (text accompanying notes 106–122).

38. The distinction between *concepts* and *conceptions*, and its relevance for interpretation, is developed in R. Dworkin, *Taking Rights Seriously* 134–136 (1977) (arguing that vague constitutional clauses represent "concepts" that each generation infuses with

meaning through translation into particular "conceptions"). The concept/conception distinction is discussed in detail in the last section of Chapter 4.

39. *See, e.g.*, Brest, *supra* note 24, at 221 (noting that under originalism "Congress could not regulate any item of commerce or any mode of transportation that did not exist in 1789; the first amendment would not protect any means of communication not known then"); *see generally* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. Chi. L. Rev. 661, 683 (1960) (Framers' intent cannot govern a totally different world).

40. *See, e.g.*, Crosskey, *supra* note 22; C. Warren, *The Making of the Constitution* 85 (1928); 1 G. Bancroft, *History of the Formation of the Constitution of the United States* 250–252 (1882); Stern, *That Commerce Which Concerns More States than One*, 47 Harv. L. Rev. 1335, 1344 (1934).

41. A. MacIntyre, *After Virtue: A Study in Moral Theory* 10 (1981).

42. *See, e.g.*, Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (upholding state prohibition of practice of law by women); Goesart v. Cleary, 335 U.S. 464 (1948) (upholding law preventing women from being bartenders except in bars owned by their husbands or fathers); M. Gruberg, *Women in American Politics: An Assessment and Sourcebook* (1960).

43. For example, the Supreme Court has used the equal protection clause to protect women—*see, e.g.*, Reed v. Reed, 404 U.S. 71 (1971); illegitimate children—*see, e.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); aliens—*see, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971); and individuals with mental handicaps—*see, e.g.*, City of Cleburne v. Cleburne Living Center, 105 S.Ct. 3249 (1985).

44. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy prevents state from prohibiting use of contraceptives by married couples); Roe v. Wade, 410 U.S. 113 (1973) (right to privacy prevents state from prohibiting abortion during first two trimesters of pregnancy).

45. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

46. *See* C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972); Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather than a Prohibition Against Jurisdiction*, 35 Stan. L. Rev. 1033 (1983); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889 (1983); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part I*, 126 U. Pa. L. Rev. 515 (1977).

CHAPTER 4

1. *See, e.g.*, R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 410 (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 6 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693, 695–699 (1977).

2. *See* discussion in Chapter 2. Also, the indeterminacy of all forms of decision making is discussed in more detail in Chapter 6.

3. *See, e.g.*, Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209, 234–235 n. 66 (1983) (changes should be by amendment); Berger, *G. Edward White's Apology for Judicial Activism*, 63 Texas L. Rev. 367, 372 (1984) ("The Framers did not leave us in the

dark in this score; by Article Five, they confided the power to amend to the people, not to the judges").

4. Bork, *supra* note 1, at 8.

5. Van Alstyne, *supra* note 3.

6. United States v. Butler, 297 U.S. 6, 62 (1936); Van Alstyne argues in favor of this approach to constitutional interpretation in Van Alstyne, *supra* note 3, at 225, 231.

7. Van Alstyne, *supra* note 3, at 229.

8. *See* Trimble v. Gordon, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (arguing that the Fourteenth Amendment only was intended and only should protect racial minorities).

9. Almost all commentators agree that virtually every decision in the last quarter of a century protecting individual liberties cannot be justified under an originalist methodology. *See, e.g.*, M. Perry, *The Constitution, the Courts, and Human Rights* 2 (1982); J. Choper, *Judicial Review and the National Political Process* 137 (1980).

10. Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279, 357 (1985).

11. *See, e.g.*, Michaels, *Response to Perry and Simon*, 58 S. Cal. L. Rev. 673, 673 (1985) (constitutional interpretation only occurs if the Court follows the original intent).

12. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 Calif. L. Rev. 1482, 1487 (1985); *see also* Perry, *The Authority of the Text, Tradition, and Reason: A Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 551, 576 (1985) (no particular approach can claim authoritative status).

13. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 374–375 (1981).

14. *See* Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. Cal. L. Rev. 649, 649 (1985) ("There is no doubt that language can be construed without reference to the author's intention in using it").

15. Michaels, *supra* note 11, at 673.

16. *Id.*, at 673.

17. Perry, *supra* note 12, at 572 n. 68.

18. Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603, 620 (1985).

19. *See, e.g.*, S. Fish, *Is There a Text in This Class?* 268–292 (1980).

20. Melvin, *Judicial Activism: The Violation of an Oath*, 27 Cath. L. Rev. 283, 284 (1982).

21. *Id.*, at 284.

22. Perry, *supra* note 12, at 588; Eakin v. Rauh, 12 S. & R. 330, 340 (Pa. 1825) (Gibson, J., dissenting) (all government officers take oath of office); Jackson, *Veto Message*, 2 *Messages and Papers of the Presidents* (Richardson ed. 1896) 576, 581–583 ("each public officer . . . takes an oath to support the Constitution").

23. Berger, *supra* note 3, at 372. The argument that the existence of the amendment process justifies originalism is addressed at text accompanying notes 45–48, *infra*.

24. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 Wash. U. L. Q. 695, 697.

25. Kay, *Preconstitutional Rules*, 42 Ohio St. L. J. 187, 193 n. 22 (1981) ("It is anomalous to argue . . . that recourse to the intention of the Framers of the Constitution is required . . . [as] demonstrated from a review of the Framers' intention"); Monaghan,

supra note 13, at 383 n. 177 ("bootstrapping" to say that the courts must follow the Framers' intent because the Framers wanted their intent to be followed).

26. National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); R. Dworkin, *Taking Rights Seriously* 135–136 (1977); Moore, *supra* note 10, at 394.

27. Lynch, *Book Review, Constitutional Law as Moral Philosophy*, 84 Colum. L. Rev. 537, 546 (1984).

28. *See, e.g.*, P. Sigmund, *Natural Law In Political Thought* 98 (1971) ("It is well known that the Declaration of Independence was based on the natural rights philosophy of John Locke"); Z. Chaffee, *How Human Rights Got into the Constitution* 12 (1952) ("[T]he opening paragraphs of the Declaration of Independence relied on the natural rights of all men everywhere"); B. Bailyn, *The Ideological Origins of the American Revolution* 77–78 (1968) (importance of natural rights philosophy); C. Mullett, *Fundamental Law and the American Revolution, 1760–1776* 17 (1933) (importance of natural law).

29. The drafters of the Constitution did not include a Bill of Rights because they believed that the enumeration of rights was unnecessary. *See* L. Levy, *Judgements: Essays on American Constitutional History* 14–15 (1972); L. Tribe, *American Constitutional Law* 3 n.7 (1978).

30. *See* Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 Iowa L. Rev. 711, 734 (1982).

31. Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 886, 948 (1985).

32. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063, 1090 (1981) ("There is no reason to suppose that the adopters of the Fourteenth Amendment intended its provisions to be interpreted by Berger's strict intentionalist canons. . . . Thus, fidelity to their intentions may require an interpreter to eschew detailed inquiry into the adopters' particular views").

33. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 3 (1980); Bork, *supra* note 1, at 3–4.

34. 313 U.S. 299 (1941).

35. *Id.*, at 315–316.

36. 290 U.S. 398 (1934).

37. *Id.*, at 435.

38. Brown v. Board of Education, 347 U.S. 483 (1954).

39. 383 U.S. 663 (1966).

40. Miranda v. Arizona, 384 U.S. 436, 531 (1966) (White, J., dissenting).

41. Powell, *supra* note 31, at 948.

42. J. Choper, *supra* note 9, at 423 nn. 7–8; 2 W. Crosskey, *Politics and the Constitution in the History of the U.S.* 1008–1046 (1953) (arguing that the Framers did not intend judicial review); Monaghan, *The Constitution Goes to Harvard*, 13 Harv. Civ. Rights-Civ. Lib. L. Rev. 117, 125 (1978) (noting that it is "increasingly doubtful that any conclusive case can be made one way or the other. It is an understatement to say that the framers lacked clarity in their thinking").

43. *See, e.g.*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135, 139, 143 (1810); Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815) (decisions based on natural law); *see also* Currie, *The Constitution in the Supreme Court: 1789–1801*, 48 U. Chi. L. Rev. 819, 844 (1981) (willingness of judges during early

part of nineteenth century to exercise "judicial discretion" to protect principles of natural justice).

44. *See, e.g.*, M. Perry, *supra* note 9, at 2; J. Choper, *supra* note 9, at 137 (modern protection of rights based on nonoriginalism).

45. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 Hastings Const. L. Q. 257, 258 (1982).

46. For a discussion of the importance of presumption in the resolution of controversies, *see* J. Patterson & D. Zarefsky, *Contemporary Debate* (1982); Whately, *Presumption and Burden of Proof*, in *Readings in Argumentation* 26–29 (J. Anderson & P. Dovre eds. 1968).

47. *See* Monaghan, *Taking Supreme Court Opinions Seriously*, 39 Md. L. Rev. 1 (1979); Monaghan, *supra* note 42 at 130; Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 Colum. L. Rev. 1029, 1032 (1977) (stating that a "great deal of doctrinal and social disruption would result if one were to turn back the clock").

48. The right of privacy could not be justified under literalism (the text does not mention it), originalism (the Framers did not intend to protect it), or process-based theories (it is a substantive value and not related to fair procedure).

49. It is tempting to try to make an originalist-type argument that the Constitution includes not only what the Framers intended but also the gloss that has been added by subsequent Supreme Court decisions. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 680–682 (1981); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–611 (1952) (Frankfurter, J., concurring) (gloss on Constitution adds to its meaning). Because the Court has frequently embraced nonoriginalism—*see* cases discussed at notes 33–42, *supra*—this method could be viewed as part of the Constitution. This, however, is an unsatisfactory way to decide constitutional theory because what has been done previously does not indicate what is best normatively.

50. Berger, *supra* note 3, at 372; Melvin, *supra* note 20, at 284.

51. Melvin, *supra* note 20, at 284.

52. The Eleventh Amendment overturned the holding of Chisholm v. Georgia, 2 U.S. (2 Dall.) (419 (1793); the Fourteenth Amendment overturned, in part, the holding of Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); the Sixteenth Amendment overturned the holding in Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895); and the Twenty-sixth Amendment overturned Oregon v. Mitchell, 400 U.S. 112 (1970).

53. *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 843 (1985) (Carter espouses an originalist philosophy to the parts of the Constitution dealing with the structure of government; *see id.*, at 861–862.). Carter recently clarified his thesis in *The Right Questions in the Creation of Constitutional Meaning*, 66 B. U. L. Rev. 71 (1986). In this essay, he says that he did not mean to imply in his earlier article advocacy for originalism. Carter recently wrote that "the interpretive visions of the document's authors are relatively unimportant to my scheme." *Id.*, at 76.

54. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. Dayton L. Rev. 745, 796–797 (1983).

55. *Id.*, at 796–797 (the Framers "would have understood Article II to exclude women from presidential eligibility"); L. Tribe, *supra* note 29, at 1060.

56. Quoted in M. Gruberg, *Women in American Politics* 4 (1960), quoted in L. Tribe, *supra* note 29, at 1060 n. 2.

57. In fact, an originalist cannot escape this conclusion by asserting that the courts

could duck the issue by declaring it to be a political question. The electoral college would be compelled to refuse to elect a female as president or vice president because such an election would violate their oath to uphold the Constitution.

58. After all, the failure of the states to ratify the equal rights amendment indicates that a constitutional amendment to ensure equal treatment of women, even in the limited area of presidential elections, is not ensured of passage.

59. In fact, the purpose of the Fourteenth Amendment, as reflected in its language, was to restrict state governments. There was no indication of a desire to limit the federal government.

60. *See, e.g.*, Bolling v. Sharp, 347 U.S. 497, 499 (1971) (applying equal protection concepts to the federal government under the due process clause of the Fifth Amendment); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment is the same as that under the Fourteenth Amendment").

61. *See* Maltz, *Some New Thoughts on an Old Problem: The Role of the Intent of the Framers in Constitutional Theory*, 63 B. U. L. Rev. 811, 850 (1983) (Bolling v. Sharp, applying equal protection to the federal government, is totally inconsistent with the Framers' intent).

62. Incumbents were not about to vote themselves out of office by redistricting the legislatures. For this reason, Chief Justice Earl Warren described the reapportionment cases as the most important decisions during his tenure on the Court. *See The Warren Court: An Editorial Preface*, 67 Mich. L. Rev. 219 (1968). *See* Baker v. Carr, 369 U.S. 186 (1962) (holding reapportionment claims to be justiciable); Reynolds v. Sims, 377 U.S. 533 (1964) (declaring one person/one vote to be constitutionally required by the equal protection clause).

63. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (trial by jury incorporated by the Fourteenth Amendment and applies to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel incorporated by the Fourteenth Amendment and applies to the states); Mapp v. Ohio, 367 U.S. 643 (1949) (exclusionary rule incorporated by the Fourteenth Amendment and applies to the states); Fiske v. Kansas, 274 U.S. 380 (1927) (First Amendment incorporated by the Fourteenth Amendment and applies to the states).

64. For a discussion of why the political process would not have desegregated the schools, *see* text accompanying notes 66–71 in this chapter.

65. Although there has been some protection of rights through statutes, such as the Civil Rights acts, there are many areas where the only protection has come through Court decisions. *See* Chemerinsky, *Rethinking State Action*, 80 Nw. L. Rev. 503, 518–519 (1985) (describing areas where the only protection of rights is through the Court). Even in areas where there are statutes protecting rights, it is highly unlikely that the statutes would have passed if they required two-thirds approval of both houses of Congress, let alone ratification by three quarters of the states.

66. *See* C. Woodward, *The Strange Career of Jim Crow* 7 (1966) (describing how segregation reflected belief in the inferiority of blacks); *see also* Brown v. Board of Education, 347 U.S. 483 (1954) (school segregation based on assumption of inferiority of blacks); Loving v. Virginia, 388 U.S. 1 (1967) (antimiscegenation statutes reflect assumption of inferiority of blacks).

67. *See* J. Bass, *Unlikely Heroes* 148 (1981): "The political realities [facing the Kennedy administration in acting on civil rights] was having to deal with Congress at a time when the seniority system was at its peak and dominated by Southern Democrats committed to the defense of segregation, either because of their conviction or their perception

of political reality at home." For a vivid description of the resistance to desegregation, *see* W. Manchester, *The Glory and The Dream: A Narrative History of America, 1932–1972* 799–810 (1974).

68. *New York Times*, March 12, 1956, at 19, col. 2 (the "Southern Declaration of Independence").

69. For a review of state laws segregating southern and border state schools, *see* R. Kluger, *Simple Justice* (1978).

70. Cahn, *Jurisprudence*, 30 N. Y. U. L. Rev. 150, 156 (1955).

71. *See* Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. Cal. L. Rev. 863 (1983) (describing areas of presidential decision making where the Constitution and Congress are silent).

72. *See, e.g.*, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976) (First Amendment limits on prior restraints used to preserve defendant's right to fair trial).

73. Justice Rehnquist has argued that the Fourteenth Amendment was intended only to protect racial minorities and it should not be used to safeguard any other group. *See* Trimble v. Gordon, 430 U.S. 762, 777–786 (1977) (Rehnquist, J., dissenting).

74. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (decisions protecting family autonomy under the Fourteenth Amendment).

75. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–415 (1819).

76. Long, *Tinkering with the Constitution*, 24 Yale L. J. 573 (1915).

77. L. Tribe, *Constitutional Choices* 289 n. 43 (1985); *see also Developments in the Law: The Interpretation of State Constitutions*, 95 Harv. L. Rev. 1324, 1353–1356 (1982).

78. For an excellent description of the social and intellectual commitment to laissez-faire principles at the end of the nineteenth century, *see* A. Paul, *The Conservative Crisis and the Rule of Law: Attitudes of the Bar and Bench, 1887–1895* (1976).

79. *See, e.g.*, Allgeyer v. Louisiana, 165 U.S. 578 (1895); Lochner v. New York, 198 U.S. 45 (1905) (cases striking down state laws as violating freedom of contract).

80. G. Gunther, *Constitutional Law* 453 (11th ed. 1985) ("[D]uring the Lochner era . . . nearly 200 regulations were struck down"); *see also* P. Murphy, *The Constitution in Crisis Times 1918–1969* 63 (1972) (between 1920 and 1930 almost 140 laws were held unconstitutional).

81. *See, e.g.*, L. Tribe, *American Constitutional Law* 446–449 (1978) (describing economic and political pressures that brought an end to Lochnerism).

82. The Supreme Court's decision in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), marked an end to the Court's protection of economic substantive due process; and the Court's decision in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), marked an end to the Court's restrictive interpretation of Congress's powers under the commerce clause.

83. 305 U.S. 337 (1938).

84. 339 U.S. 629 (1950).

85. 339 U.S. 637 (1950).

86. 347 U.S. 483 (1954). For an excellent history of the school desegregation litigation leading up to Brown v. Board of Education, *see* R. Kluger, *supra* note 69.

87. *See, e.g.*, Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. Atlanta, 350 U.S. 879 (1955) (golf

courses); New Orleans City Park Improvement Association v. Detiege, 358 U.S. 54 (1958) (parks).

88. Johnson v. Virginia, 373 U.S. 61 (1963).

89. *See, e.g.*, A. Wildavsky, *Incrementalism* (1972).

90. But the argument can be made that incremental changes legitimized those opposing segregation and substantial incremental change is unlikely to occur. *See, e.g.*, J. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* (1984); Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049 (1978).

91. Chief Justice Marshall, in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819), described the Constitution in these terms. ("Its nature, therefore, requires that only its great outlines should be marked, its important objects designated").

92. *See* Chemerinsky, *supra* note 71, at 871–872.

93. Powell, *supra* note 31, at 913.

94. Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. Rev. 204, 205 (1980).

95. *Id.*, at 205.

96. R. Dworkin, *supra* note 26, at 134–136.

97. *Id.*, at 134.

98. Munzer & Nickel, *supra* note 47, at 1037.

99. Simon, *supra* note 12, at 1517.

100. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303, 307 (1880) (Fourteenth Amendment's purpose is to prevent discrimination against blacks).

101. *See, e.g.*, Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 71 (1873) (Fourteenth Amendment's purpose is to ensure freedom for former slaves).

102. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (equal protection clause applies to discrimination on the basis of race or national origin).

103. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152–153 n. 4 (1938) (describing Fourteenth Amendment's protection of insular minorities).

104. *See, e.g.*, F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920); Perry, *Modern Equal Protection: A Conceptualization and an Appraisal*, 79 Colum. L. Rev. 1023, 1068–1069 (1979); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949).

105. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781, 791 (1983).

106. Brest, *supra* note 32, at 1092 ("The fact is that all adjudication requires making choices among the levels of generality on which to articulate principles and all such choices are inherently non-neutral").

107. *See* Monaghan, *supra* note 13, at 378 (describing process of "conceptualizing original intent at a level of abstraction that, in effect, removes it as an institutional constraint").

108. In fact, the Supreme Court in Brown v. Board of Education explicitly stated that changes in the importance of education and the development of free public education made the Framers' intent of limited relevance. 347 U.S. 483 (1954).

109. Bork, *supra* note 1, at 14 (defending Brown on the grounds that the Fourteenth Amendment "was intended to enforce a core idea of black equality against government discrimination").

110. *See* Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445, 462 n. 54

(1984) (describing how Bork manipulates the level of generality to achieve particular results).

111. During the 1950s, originalists attacked the school desegregation decisions with all the fervor that has been applied to *Roe v. Wade*. It is telling that as society has come to accept the wisdom and necessity of these decisions, the methodological objections to them have disappeared and originalists find *Brown* the hardest example for them to deal with. For originalist arguments criticizing the *Brown* decision, *see, e.g.*, Cook, *School Segregation Decisions: Opposing the Option of the Supreme Court*, 42 A. B. A. J. 313 (1956); Crownover, *Segregation Cases: A Deliberate and Dangerous Exercise of Power*, 42 A. B. A. J. 727 (1956); Sanders, *Implications of the Segregation Decisions*, 4 La. B. J. 93 (1956).

112. L. Lusky, *By What Right?: A Commentary on the Supreme Court's Power to Revise the Constitution* 21 (1975); *see also* Linde, *Judges, Critics, and the Realist Tradition*, 82 Yale L. J. 227, 254 (1972).

113. Tushnet, *supra* note 105, at 793, 802.

114. Perry, *supra* note 12, at 599.

115. *Id.*, at 599.

116. Bennett, *supra* note 110, at 457; Lynch, *supra* note 27, at 547 ("An inquiry into whether the drafters—let alone the ratifiers—of the fourth amendment would have considered the electronic interception of telephone signals to be similar to a writ of assistance, if only they had known about the role of telephonic communications in modern society is a manifest absurdity: to give Madison enough information about contemporary society and technology to answer the question intelligently would be to transform him from Madison the framer to Madison our contemporary and thus to deny him of the ability to speak the framer's intent").

117. M. Perry, *supra* note 9, at 37–60 [no functional justification exists for non-interpretive review in separation of powers cases, *id.*, at 60]; Carter, *Constitutional Adjudication and the Indeterminate Text*, *supra* note 53, at 861–862. Carter has recently written that he did not mean to advocate originalism for the political Constitution. Carter, *The Right Questions in the Creation of Constitutional Meaning*, *supra* note 53, at 71, 74. Carter, however, continues to argue for a more limited role for the Court in separation of powers cases as compared to individual liberties cases. Carter writes: "My goal . . . is to construct a constitutional safe harbor, a place where adjudication will be possible through an ordered application of interpretive rules to a text and its history. The political Constitution strikes me as the obvious place to build, at least if we want an edifice that will stand. Were the courts somehow above the political fray rather than an integral part of it, finding narrowing hermeneutical methods would perhaps be less important. But if the work of the judiciary is, as I have suggested, a vital part of the system of checks and balances, then rendering that system as concrete as can be is plainly indispensable." *Id.*, at 76. Thus, although Carter disavows any reliance on the Framers' intent, he continues to advocate a different interpretive method for the political Constitution than for individual rights. Although the text focuses on Carter's first article where the claim seemed to be directly for originalism, the arguments also apply to his most recent essay because I question whether it makes sense to use different methods of interpretation for varying parts of the Constitution.

118. Carter, *Constitutional Adjudication and the Indeterminate Text*, *supra* note 53, at 861.

119. *See* text accompanying notes 11–22, *supra* (arguing that originalism cannot be

asserted to be correct and must be demonstrated to be desirable on the basis of a normative theory)

120. Carter, *Constitutional Adjudication and the Indeterminate Text, supra* note 53, at 861.

121. Carter, *Constitutional Adjudication and the Indeterminate Text, supra* note 53, at 861.

122. *See* discussion accompanying notes 54–56, *supra*; Saphire, *supra* note 54, at 796–797.

123. *See* Chemerinsky, *supra* note 71, at 866 (defining such situations as presenting questions of inherent presidential power and discussing the frequency of such questions arising).

124. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

125. Goldwater v. Carter, 444 U.S. 996 (1979).

126. Train v. City of New York, 420 U.S. 35 (1975); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319 (D. D. C. 1975); National Council of Community Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 901 (D. D. C. 1973).

127. United States v. Nixon, 418 U.S. 683 (1974).

128. There were numerous challenges to the constitutionality of the Vietnam War. For a description of these cases, *see* A. D'Amato & R. O'Neill, *The Judiciary and Vietnam* 51–58 (1972); Henken, *Vietnam in the Courts of the United States: Political Questions*, 63 Am. J. Int'l L. 284, 284–289 (1969); Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 Colum. J. Transn'l L. 470, 470–476 (1974).

129. *See, e.g.*, Chadha v. Immigration and Naturalization Service, 462 U.S. 919 (1983).

130. Carter, *Constitutional Adjudication and the Indeterminate Text, supra* note 53, at 861.

131. *Id.*, at 861–862.

132. *Id.*, at 861–862.

133. I developed this argument in Chapter 3, in the text accompanying notes 13–31.

134. *See* R. Collingwood, *The Idea of History* (1946); Florovsky, *The Study of the Past*, in *Ideas of History* (R. Nash ed. 1969); E. Carr, *What Is History* 16–22 (1964) (history is always a process of interpretation). I developed this argument in Chapter 3, in the text accompanying notes 32–35.

CHAPTER 5

1. Thomas Jefferson, letter to Abigail Adams, September 11, 1804, 8 *The Writings of Thomas Jefferson* 310 (Ford ed. 1897).

2. Andrew Jackson, *Veto Message*, 2 *Messages and Papers of the Presidents* 576, 581–583 (Richardson ed. 1896).

3. 31 U.S.C.A. §3351–3556 (West. Supp. 1985).

4. The CICA permits a potential or actual bidder for a government contract who disputes the terms or award of a government contract to challenge the procurement of the contract by filing a protest with the comptroller general. The filing of a protest freezes, or stays, the award of any action until the comptroller general makes a decision on the protest or the agency head certifies in writing that there are "urgent and compelling" circum-

stances that require the immediate award of the contract. *See* 31 U. S. C. A. 3553 (West Supp. 1985).

5. The General Accounting Office is a congressional agency that primarily performs investigations of government operations. The comptroller general, the highest ranking official, is appointed by the president. For a discussion of the role and duties of the comptroller general, *see* Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3rd Cir. 1986) (upholding the constitutionality of the CICA); *see also* Bowsher v. Synar, 106 S.Ct. 3181 (1986) (ruling on the constitutionality of the Gramm-Rudman Balanced Budget and Emergency Deficit Control Act based on the role of the comptroller general).

6. 20 *Weekly Compilations of Presidential Documents* 1027 (July 18, 1984).

7. *Procedures Governing Implementation of Certain Unconstitutional Provisions of the CICA of 1984*, Office of Management and Budgeting Bulletin 85–88 (1985), quoted in Ameron, Inc. v. U. S. Army Corps of Engineers, 610 F. Supp. 750, 754 (D. C. N. J. 1985).

8. *Constitutionality of GAO's Bid Protest Function*, Hearings before a Subcomm. of the House Comm. on Government Operations, 99th Cong., 1st Sess., 301, 318 (1985) (testimony of D. Lowel Jensen, acting deputy attorney general).

9. Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. 754 (D. C. N. J. 1985).

10. *New York Times*, May 21, 1985, at A–26 (letter of Attorney General Edwin Meese).

11. *New York Times*, May 15, 1985, at B–10.

12. *New York Times*, June 4, 1985, at A–14.

13. Meese, "The Law of the Constitution: A Bicentennial Lecture," Tulane University Citizens Forum on the Bicentennial of the Constitution, October 21, 1986, at 11.

14. *See* A. D'Amato & R. O'Neill, *The Judiciary and Vietnam* 51–58 (1972); Henken, *Vietnam in the Courts of the United States: Political Questions*, 63 Am. J. Int'l. L. 284, 284–289 (1969); Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 Colum. J. Trans'l L. 470, 470–476 (1974). *See, e.g.*, Holtzman v. Schlesinger, 484 F. 2d 1307, 1309 (3rd Cir.), *cert. denied*, 416 U.S. 936 (1973); DeCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972) (declaring question of the constitutionality of the Vietnam War to be a political question).

15. Sanchez-Espinoza v. Regan, 568 F. Supp. 596 (D. D. C. 1983), *aff'd* 770 F.2d 202 (D. C. Cir. 1985); Ramirez deArellano v. Weinberger, 568 F. Supp. 1236 (D. D. C. 1983), *aff'd on other grounds*, 724 F.2d 143 (D. C. Cir. 1983) (dismissing challenges to U.S. policy in Nicaragua as a political question).

16. 5 U.S. (1 Cranch) 137, 177 (1803).

17. 418 U.S. 683 (1974).

18. *Id.*, at 703–705.

19. *Id.*, at 713.

20. *Id.*, at 709.

21. There are several "abstention doctrines"—rules for when federal courts should abstain from deciding a case even though they have jurisdiction. *See, e.g.*, Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). The Supreme Court, however, has emphasized that the abstention doctrines are limited exceptions to a general rule that "there is a virtually

unflagging obligation of the federal courts to exercise the jurisdiction given them." Colorado River Water Conservation Dist. v. United States, 424 U.S., at 817.

22. Cohens v. Virginia, 19 U.S. (6 Wheat), 264, 404 (1821); *see also* Wilcox v. Consolidated Gas Co., 212 U.S. 19, 39–40 (1909).

23. Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding the constitutionality of disenfranchising ex-felons).

24. Comment, *Confronting the Conditions of Confinement: An Expanded Role for the Courts in Prison Reform*, 12 Harv. Civ. Rights-Civ. Lib. L. Rev. 367, 386 (1980) ("[T]he improvement of prison living conditions is not an issue likely to engender widespread political support. States have limited financial resources, the public is increasingly alarmed about crime, and a disproportionate number of criminals come from socioeconomic groups which themselves lack political power. Legislators and executive officials therefore have few but humanitarian incentives to finance improvements in prison conditions"). *See also* Frug, *The Judicial Power of the Purse*, 126 U. Pa. L. Rev. 715, 718, 723 (1978).

25. *See* M. Perry, *The Constitution, the Courts, and Human Rights* 146–162 (1982) (describing the importance of nonoriginalist review in such cases).

26. The notion that likes should be treated alike is thought to stem from Aristotle and be the basis of formal equality and justice. *See* Plato, *The Republic* VIII 558 (B. Jowett trans. 1892); P. Polyviou, *The Equal Protection of the Laws* 7 (1980); H. L. A. Hart, *The Concept of Law* 153–163 (1961).

27. *See* Ashwander v. United States, 297 U.S. 288, 346 (1936) (Brandies, J., concurring) (describing circumstances under which federal courts should avoid ruling on constitutional questions).

28. *See, e.g.*, Brest, *Who Decides?*, 58 S. Cal. L. Rev. 661, 663 (1985) ("Judges do not represent constituents; they should decide each case on its own terms and not engage in the 'logrolling' or 'horsetrading' that characterizes other political decision-making").

29. 1 A. de Tocqueville, *Democracy in America* 103 (Bradley ed. 1945).

30. Fiss, *The Forms of Justice* 93 Harv. L. Rev. 1, 10 (1979).

31. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221, 246–247 (1973).

32. *See, e.g.*, Moore, *Moral Reality*, 1982 Wis. L. Rev. 1061; Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279 (1985).

33. *See, e.g.*, Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 Calif. L. Rev. 1482, 1505–1510 (1985).

34. *See, e.g.*, Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 Minn. L. Rev. 587, 629–637 (1985) (arguing for tradition as a basis for judicial decision making); J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 60–63 (1980) (describing and critiquing tradition as a basis for decisions).

35. A. Bickel, *The Least Dangerous Branch* 26 (1962).

36. *See, e.g.*, Marshall v. Weinberger, 103 S.Ct. 843, 851 n.4 (1983); Capp. v. Naughton, 414 U.S. 141, 149–150 (1973); Rochin v. California, 342 U.S. 165, 169 (1952).

37. Although the Congress publishes legislative histories and the president issues official statements, there is no obligation that either of these branches decide solely on the merits or on the basis of arguments and reasoning. Purely political decisions are accepted and expected from the political branches of government.

38. *See generally* Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445,

479 (1984) (describing requirement for written opinions as primary constraint upon judiciary); *The Speeches of the Right Honorable Edmund Burke on the Impeachment of Warren Hastings* 200–201 (H. G. Bohn ed. 1901) (need for judiciary to give reasons for its decisions); Radin, *The Requirement of Written Opinions*, 18 Calif. L. Rev. 486 (1930) (requirement in state constitutions and common law for written opinions).

39. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 Va. L. Rev. 279, 299 (1973); *see also* Dewey, *Logical Method and the Law*, 10 Cornell L. Q. 17, 24 (1924) (importance of judicial statements of reasons for decisions); Karst, *Legislative Facts in Constitutional Litigation*, 1960 Sup. Ct. Rev. 75, 75–76 ("[U]nexplained decisions tend to substitute judicial fiat not only for the rule of a democratic majority but also for the rule of law").

40. Golding, *Principled Decision-Making and the Supreme Court*, 63 Colum. L. Rev. 35, 40–41 (1963); Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1, 19 (1959).

41. *See* Braden, *The Search for Objectivity in Constitutional Law*, 57 Yale L. J. 571, 576 (1948) (describing decision rules as limits on judicial powers); Bennett, *supra* note 38, at 479 (describing requirement for justification as limit on judicial power).

42. Many have suggested that judicial decisions are merely public rationalizations for hunches. *See, e.g.*, W. Douglas, *The Court Years* 8 (1980); J. Frank, *Law and the Modern Mind* 148 (1930); Hutcheson, *The Judgment Intuitive; The Function of Hunch in Judicial Decision*, 14 Cornell L. Q. 274 (1929).

43. R. Wasserstrom, *The Judicial Decision* 25–30 (1961). Ely criticizes decisions based on moral analysis by saying that they come down to a statement of: "We like Rawls, you like Nozick. We win 6–3." J. Ely, *supra* note 34, at 58. The reason this is undesirable is not because Rawls's theory is an impermissible basis for determining constitutional values but because the Court should give reasons for its conclusions and should justify its adherence to a particular theory.

44. Spann, *Expository Justice*, 131 U. Pa. L. Rev. 585, 598 (1983).

45. Dewey, *supra* note 39, at 24.

46. *See, e.g.*, L. Festinger, *A Theory of Cognitive Dissonance* (1957); G. Miller & M. Burgoon, *New Techniques of Persuasion* 61 (1973); Aronson, *Dissonance Theory: Progress and Problems*, in *Theories of Cognitive Consistency: A Sourcebook* 24 (Abelson ed. 1968).

47. 347 U.S. 483 (1954).

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

49. *See* Erskine & Siegel, *Civil Liberties and the American Public* 31 J. of Social Issues 13, 19–21 (1975) (shift in public opinion on controversial questions like school desegregation and abortion because of Supreme Court decisions); Combs, *The Supreme Court as a National Policy-Maker: A Historical and Legal Analysis of School Desegregation*, 8 So. U. L. Rev. 197, 229 (1982) (Court as catalyst for changes in public opinion on school desegregation); F. Way, *Liberty in the Balance: Current Issues in Civil Liberties* 19 (1976) (describing changes in opinion on school desegregation because of Court's decisions).

50. For a discussion of the benefits of the adversary system as a method of dispute resolution, *see* Fuller, *The Adversary System*, in *Talks on American Law* (H. Berman ed. 1961); Simon, *The Ideology of Advocacy*, 1978 Wis. L. Rev. 30; M. Frankel, *Partisan Justice* (1980); M. Freedman, *Lawyer's Ethics in an Adversary System* (1975).

51. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*,

1980 Wis. L. Rev. 467, 494–496 (listing cases in which the Supreme Court has reversed itself).

52. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

53. Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

54. 410 U.S. 113, 163–164 (1973).

55. 384 U.S. 436 (1966).

56. 395 U.S. 444 (1969).

57. 413 U.S. 15 (1973).

58. 403 U.S. 602 (1971).

59. Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985).

60. National League of Cities v. Usery, 426 U.S. 833 (1976).

61. Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct., at 1011–1020.

62. Moore, *A Natural Law Theory of Interpretation*, *supra* note 32, at 371–372.

63. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L. J. 161, 169 (1930).

64. *See* Dewey, *supra* note 39, at 24; Greenawalt, *Discretion and the Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 Colum. L. Rev. 359, 383–384 (1975).

65. *See* Moore, *A Natural Law Theory of Interpretation*, *supra* note 32, at 393–396 (describing moral reality as it applies in interpreting constitutional texts).

66. M. Perry, *supra* note 25, at 102.

67. *Id.*, at 115.

68. Wellington, *supra* note 31, at 284.

69. *See, e.g.*, Conkle, *supra* note 34, at 629–637 (arguing for tradition as a basis for judicial decision making; J. Ely, *supra* note 34, at 60–63 (1980) (describing and critiquing tradition as a basis for decisions).

70. G. White, *Patterns in American Legal Thought* 160 (1978); Simon, *supra* note 33, at 1505–1510.

71. Lynch, *Constitutional Law as Moral Philosophy*, 84 Colum. L. Rev. 537, 550 (1984).

72. *See* Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 855–858 (1985) (describing clarity of many constitutional provisions and the relative lack of interpretive questions under them).

73. United States v. Nixon, 418 U.S. 683 (1974). James St. Clair, in defending Nixon, argued to the Supreme Court that the president has equal authority to interpret the Constitution and determine the scope of executive privilege. *See Transcript of Oral Arguments in United States v. Nixon*, 60–61 (1974); L. Jaworski, *The Right and the Power* 194 (1976).

74. For example, The Grand Jury investigating the Watergate cover-up did not indict Richard Nixon because they were unsure whether they could indict a sitting President, *Id.*, at 99–103.

75. 418 U.S. 166 (1974).

76. *Id.*, at 179.

77. 418 U.S. 208 (1974).

78. *Id.*, at 227.

79. 102 S.Ct. 752 (1982).

80. *Id.*, at 765.

81. *Id.*, at 767.

82. For an originalist argument that standing is not a constitutionality required limit on judicial power, *see* Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement?* 78 Yale L. J. 816, 827 (1969).

83. *See* Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979); Warth v. Seldin, 422 U.S. 490, 501 (1976) (generalized grievance doctrine is prudential, not constitutional).

84. *See* L. Tribe, *American Constitutional Law* 71–73 (1978) (political question doctrine leaves matter to other branches to decide); Henken, *Is There a Political Question Doctrine?* 85 Yale L. J. 597 (1976).

85. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165–166, 170 (1803).

86. *See, e.g.*, Goldwater v. Carter, 444 U.S. 996 (1979); Little v. Barreme, 6 U.S. (2 Cranch) 177 (1804); *see generally* Tigar, *Judicial Power, the 'Political Question Doctrine,' and Foreign Relations*, 17 U.C.L.A. L. Rev. 1135 (1970).

87. 444 U.S. 996 (1979).

88. *Id.*, at 1003.

89. *See* A. D'Amato & R. O'Neill, *supra* note 13, at 51–58; Henken, *Vietnam in the Courts of the United States: Political Questions*, 63 Am. J. Int'l L. 284, 284–289 (1969); Sugarman, *Judicial Decisions Concerning the Constitutionality of United States Military Activity in Indo-China: A Bibliography of Court Decisions*, 13 Colum. J. Trans'l L. 470, 470–476 (1974). *See, e.g.*, Holtzman v. Schlesinger, 484 F.2d 1307, 1309 (3rd Cir.), *cert. denied*, 416 U.S. 936 (1973); DeCosta v. Laird, 471 F.2d 1146, 1147 (2d Cir. 1973); Sarnoff v. Connally, 457 F.2d 809, 810 (9th Cir. 1972) (declaring question of the constitutionality of the Vietnam War to be a political question).

90. *See, e.g.*, Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (holding that disputes involving the "republican form of government clause" present a political question).

91. *See, e.g.*, Coleman v. Miller, 307 U.S. 433 (1939) (dispute over process of ratifying constitutional amendments poses a political question).

92. J. Choper, *Judicial Review and the National Political Process* 263, 298 (1980). Choper also argues that questions of federalism should be left to the political process.

93. *Id.*, at 263.

94. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (declaring unconstitutional presidential seizure of steel mills).

95. *See, e.g.*, Train v. City of New York, 420 U.S. 35 (1975) (invalidating presidential impoundment of funds on statutory grounds); Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1325 (D. D. C. 1975) (declaring presidential impoundment of funds to be unconstitutional); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 75 (D. D. C. 1973) (declaring unconstitutional presidential impoundment of funds).

96. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 594 (Frankfurter, J., concurring).

97. *See* Miller, *An Inquiry into the Relevance of the Intentions of the Founding Fathers, With Special Emphasis Upon the Doctrine of Separation of Powers*, 27 Ark. L. Rev. 583, 600 (1973).

98. Gewirtz, *The Courts, Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 Law & Contemp. Probs. 46, 79 (1976); *see also* A. Miller, *Presidential Power in a Nutshell* 29–30 (1977).

99. Gewirtz, *supra* note 98, at 79.

100. 5 U.S. (1 Cranch) 137, 165–166 (1803).

101. 369 U.S. 186, 211 (1961) (emphasis added).

102. Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting).

103. *See, e.g.*, United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–316 (1936) (arguing that the president has special expertise and therefore greater powers in the area of foreign affairs); *but see* Lofgren, *United States v. Curtiss-Wright Export Corporation: A Historical Reassessment*, 83 Yale L. J. 1 (1973) (challenging the reasoning and holding in Curtiss-Wright).

104. *See, e.g.*, L. Tribe, *Constitutional Choices* 22–23 (1985) (arguing that the constitutional amendment process is properly regarded as a political question); *but see* Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 Harv. L. Rev. 386 (1983).

105. Quoted in L. Tribe, *supra* note 104, at 23.

106. *Id.*, at 22; Coleman v. Miller, 307 U.S. 433 (1939).

107. The history of the ratification of the Fourteenth Amendment is reviewed in Coleman v. Miller, 307 U.S. 433 (1939).

108. In other words, a distinction should be drawn between deference and abdication. Certainly, the Court should be deferential, especially in questions involving amendments to overturn the Court's decisions. This, however, does not require total judicial abdication.

109. J. Choper, *supra* note 92, at 260–379 (arguing for judicial restraint in reviewing separation of powers questions).

110. *See* A. Bickel, *The Supreme Court and the Idea of Progress* 94 (1970) (Court risks its credibility when it intervenes too much); Bickel, *The Passive Virtues*, 75 Harv. L. Rev. 40 (1961) (arguing for judicial restraint to preserve judicial credibility).

111. J. Choper, *supra* note 92, at 139–140 ("[T]he Court's public prestige and institutional capital [are] exhaustible"); A. Bickel, *supra* note 110, at 94–95 ("[T]here is a natural quantitative limit to the number of major, principled interventions the Court can permit itself. . . . A Court unmindful of this limit will find that more and more of its pronouncements are unfulfilled promises, which will ultimately discredit and denude the functions of constitutional adjudication").

112. Choper argues that the Court should reserve its decisions for individual rights cases. J. Choper, *supra* note 92, at 60–84.

113. 343 U.S. 579 (1952).

114. 418 U.S. 683 (1974).

115. For example, the credibility of the federal judiciary was enhanced by the courts' role in the Watergate scandal. *See* Frankel, *Book Review*, 43 U. Chi. L. Rev. 874, 874 (1976).

116. Tigar, *supra* note 86, at 1142.

117. J. Choper, *supra* note 92, at 56 (describing instances of presidential disobedience to judicial rulings).

CHAPTER 6

1. *See* Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. Cal. L. Rev. 603, 606 (1985) (the search for ways of constraining justices has been the preoccupation of constitutional scholarship throughout the century).

2. Bennett, *Objectivity in Constitutional Law*, 132 U. Pa. L. Rev. 445, 447 (1984); *see, e.g.*, Solem v. Helm, 103 S.Ct. 3001, 3022 (1983) (Burger, C. J., dissenting) ("Today's conclusion by five justices . . . is nothing other than a bald substitution of individual subjective moral values for those of the legislature").

3. *See* R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1 (1971); Rehnquist, *The Notion of a Living Constitution*, 54 Texas L. Rev. 693 (1976).

4. Bork, *supra* note 3, at 6.

5. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L. J. 821, 826 (1985) (describing position of liberal critics such as Tushnet); *see also* Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. Cal. L. Rev. 683, 685 (1985); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L. J. 1037, 1057 (1980).

6. *See, e.g.*, Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 781 (1983); Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 Ohio St. L. J. 411 (1981); Tushnet, *Darkness on the Edge of Town*, *supra* note 5, at 1057.

7. Simon, *supra* note 1, at 606.

8. The term *literalism* for this theory comes from Robert Bennett. *See* Bennett, *'Mere Rationality' in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049, 1089 (1979). Paul Brest refers to this theory as "textualism." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 206 (1980).

9. United States v. Butler, 297 U.S. 1, 62 (1936); *see also* Van Alstyne, *Interpreting This Constitution: The Unhelpful Contributions of Special Theories of Judicial Review*, 35 U. Fla. L. Rev. 209, 229, 231 (1983).

10. *See, e.g.*, *In re* Winship, 397 U.S. 358, 377–378 (1970) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 508–509, 520–521 (1965) (Black, J., dissenting); Rochin v. California, 342 U.S. 165, 174 (1952) (Black, J., concurring); H. Black, *A Constitutional Faith* 33–34 (1968).

11. Brest, *supra* note 8, at 204; Raoul Berger is a classic example of an originalist. *See* R. Berger, *supra* note 3, at 408; *see also* Rehnquist, *supra* note 3, at 694–695 (acknowledging that the Constitution may apply to cases not foreseen by the Framers but criticizing the view that the Court should "substitute some other set of values for those which may be derived from the language and intent of the framers").

12. *See* Munzer & Nickel, *Does the Constitution Mean What It Always Meant?* 77 Colum L. Rev. 1029, 1030 (1977); Brest, *supra* note 8, at 204.

13. Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting).

14. Brest terms this theory "moderate originalism." Brest, *supra* note 8, at 205 (stating that "moderate originalism . . . [is] more concerned with the adopters' general purpose than with their intentions in a very precise sense"). It is distinct from originalism because originalism limits constitutional interpretation to what the Framers intended, whereas conceptualism allows consideration of modern circumstances in interpretation. Undoubtedly, under originalism, the Framers' intent can be stated at many different levels of abstraction. The distinction between originalism and conceptualism, therefore, is not always clear. Ultimately, the difference is that originalism is based on the belief that the

meaning of the Constitution is static, but conceptualism endorses the view that the precise meaning of the Constitution shifts over time. For a full discussion of conceptualism, *see* Chapter 4, *supra*, text accompanying notes 86–102.

15. R. Dworkin, *Taking Rights Seriously* 134–136 (1977) (drawing the distinction between concepts and conceptions; arguing that vague constitutional clauses represent "concepts" that each generation infuses with meaning through translation into particular "conceptions").

16. A variation of the conceptualist approach is to ask "[w]hat results would the drafters have intended had they been confronted with the problems and context of today's world?" L. Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* 21 (1975). This might be thought of as a separate approach, termed "transposition." *See* Tushnet, *Following the Rules Laid Down*, *supra* note 6, at 793, 802. For a discussion of transposition, *see* Chapter 4, *supra*, text accompanying notes 101–105.

17. I believe that cultural values theories are indistinguishable from "open-ended modernism" because both allow judges to decide what values are sufficiently important as to be worthy of constitutional protection. However, advocates of cultural values theories see them as a constraint on judicial decision making. *See, e.g.*, Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 Minn. L. Rev. 587 (1985) (arguing for tradition as an alternative to judges deciding cases based on their own values). I reject the view that these theories constrain the Court because I believe almost anything can be said to be part of the "natural law," "traditions," or the "deep consensus." *See* text accompanying notes 40–47, *infra*, this chapter.

18. *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 985, 1040–1041 (1979) (determining fundamental values through examination of historical traditions); Conkle, *supra* note 17, at 626–637.

19. G. White, *Patterns of American Legal Thought* 160 (1978); *see also* Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?* 73 Calif. L. Rev. 1482, 1505–1510 (1985) (constitutional interpretation based on "deeply layered consensus").

20. Ely reviews these theories in J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 63–69 (1980). For an example of a theorist believing constitutional interpretation should be based on natural law principles, *see* Moore, *A Natural Law Theory of Interpretation*, 58 S. Cal. L. Rev. 279, 393–396 (1985). For an example of a theorist arguing for constitutional interpretation based on moral consensus, *see* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221, 284 (1973).

21. J. Ely, *supra* note 19, at 73–75 (describing view that constitutional interpretation should be process bound rather than substantive).

22. *Id.*, at vii, 73–77.

23. *See* Chapter 1, *supra*, text accompanying notes 81–109.

24. J. Ely, *supra* note 19, at 48.

25. Dworkin, *Is Law a System of Rules?* in *Essays on Legal Philosophy* 44–45 (R. Summers ed. 1968).

26. *See* Bennett, *supra* note 2, at 447 (describing what it means for judges to decide cases based on their personal interests).

27. *See* Tammado, *Legal Formalism and Formalistic Devices of Juristic Thinking*, in *Law and Philosophy* 316 (S. Hook ed. 1964); H. L. A. Hart, *The Concept of Law* 126

(1961); N. MacCormick, *Legal Reasoning and Legal Theory* 21–22 (1978) (describing legal formalism).

28. For an excellent discussion of problems in interpreting language literally, *see* Moore, *The Semantics of Judging*, 54 S. Cal. L. Rev. 151, 181–202 (1981) (discussing ambiguity, metaphors, vagueness, and open-texture as problems of interpretation).

29. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–415 (1819).

30. U.S. Const. Art. I, §8.

31. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414–415 (1819) (discussing meaning of the necessary and proper clause in art. I, §8).

32. H. L. A. Hart, *supra* note 27, at 129–132.

33. *Id.*, at 132.

34. M. Perry, *The Constitution, the Courts, and Human Rights* ix (1982).

35. For example, the Supreme Court has held that the Eleventh Amendment's limitation on state liability in federal court is modified by the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

36. People v. Castro, 113 Ill. App. 3d 265, 270, 446 N.E.2d 1267, 1271 (1983); this case is discussed in Levinson, *What Do Lawyers Know (and What Do They Do With Their Knowledge)? Comments on Schauer and Moore*, 58 S. Cal. L. Rev. 441, 450 (1985).

37. *See* Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502, 508–509 (1964); J. Ely, *supra* note 19, at 17; *see also* discussion in Chapter 3, *supra*, text accompanying notes 26–34.

38. *See* Arrow, *A Difficulty in the Concept of Social Welfare*, 58 J. Pol. Econ. 328 (1950); *see also* A. Feldman, *Welfare Economics and Social Choice Theory* 178–195 (1980); *cf.* Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802 (1982) (applying Arrow's Impossibility Theorem to the Supreme Court).

39. *See* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 Ohio St. L. J. 3, 7 (1981); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 Yale L. J. 1063, 1092 (1981); *see also* the discussion in Chapter 4, *supra*, text accompanying notes 86–100.

40. *See* discussion in Chapter 4, *supra*, text accompanying notes 90–94.

41. Brest, *supra* note 39, at 1092.

42. *Id.*, at 1092.

43. G. White, *supra* note 20, at 160. Wellington is one of the most prominent advocates of this approach. *See, e.g.*, Wellington, *supra* note 19, at 284.

44. For an excellent criticism of these theories, describing their inability to constrain judges, *see* J. Ely, *supra* note 19, at 48–69. I recognize that natural law theories often are not based on a particular culture's values and hence it is perhaps wrong to place them under the label "cultural value theories." Yet, I do so here because natural law, like tradition and consensus, are possible sources of values for judicial decision makers that are not based on the text of the Constitution or the Framers' intent. Hence, these sources, albeit quite different, share an important common characteristic.

45. *Id.*, at 50.

46. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

47. G. Wills, *Inventing America* xiii (1978), *quoted in* J. Ely, *supra* note 19, at 60.

48. J. Ely, *supra* note 19, at 69.

49. Radin, *Cruel Punishment and Respect for Persons; Super Due Process for Death*, 53 S. Cal. L. Rev. 1143, 1176 & n.109 (1980).

50. Wellington, *supra* note 19, at 67. *See also* Simon, *supra* note 20, at 1505–1510 (describing interpretation based on "deeply layered consensus").

51. J. Ely, *supra* note 19, at 67.

52. *See, e.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 Yale L. J. 1063, 1067 (1980) (criticizing process-based theories because of their failure to deal with substantive constitutional provisions); *see also* discussion in Chapter 1, *supra*, text accompanying notes 85–88.

53. E. Levi, *An Introduction to Legal Reasoning* 1–2 (1961); *see also* J. Stone, *The Province and Function of Law: A Study in Jurisprudence* 8–9 (1950).

54. *See* Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984); Linder, *Freedom of Association after Roberts v. United States Jaycees*, 82 Mich. L. Rev. 1878 (1985).

55. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Bob Jones University v. United States, 103 S.Ct. 2017 (1983). For an excellent discussion of the tension between freedom of association and other social values, such as equality, *see* Marshall, *Discrimination and the Right of Association*, 81 Nw.U. L. Rev. 68 (1986).

56. *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976).

57. For an excellent discussion of the tension between the establishment clause and the free exercise clause, and a proposed solution, *see* Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545 (1983).

58. Nowak, *Resurrecting Realist Jurisprudence: The Political Bias of Burger Court Justices*, 17 Suffolk L. Rev. 549, 616 (1983).

59. M. Perry, *supra* note 34, at 111, 123.

60. Miller, *Judicial Activism and American Constitutionalism: Some Notes and Reflections*, in XX *Nomos* 333, 349 (J. Pennock & J. Chapman eds. 1979).

61. *See* Conkle, *supra* note 17, at 615 ("The requirement of principled explanation . . . derives from the more fundamental proposition that courts adjudicating constitutional cases, must render judicial decisions, not legislative ones").

62. J. Frank, *Law and the Modern Mind* 21 (1930).

63. *See* B. Bailyn, *The Ideological Origins of the American Revolution* 273–280 (1967); G. Wood, *The Creation of the American Republic* 151 (1969) (describing distrust of those in power as inspiring the structure of American government).

64. A. Bickel, *The Least Dangerous Branch* 28 (1962).

65. See R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977) (criticizing excessive judicial activism under the Fourteenth Amendment).

66. *See* Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours legislation for bakers). The decision is symbolic of the period from the late nineteenth century until 1937, during which the Court overturned needed federal and state social legislation. *See L. Tribe, American Constitutional Law* 434–436 (1978) (discussing use of the term "Lochner era").

67. *See* L. Tribe, *supra* note 66, at 446–449.

68. Ely, *Democracy and the Right to Be Different*, 56 N.Y.U. L. Rev. 397, 402 (1981).

69. Monaghan, *Commentary*, 56 N.Y.U. L. Rev. 525, 533 (1981).

70. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 Hastings Const.

L. Q. 257, 278 (1982) ("The Court has made its mistakes, including a few egregious ones, but so have the other branches of government").

71. Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 10 (1979).

72. For a discussion of the general failure of state governments to protect constitutional rights adequately, *see* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1977).

73. L. Tribe, *supra* note 66, at 13.

74. *See* R. Dworkin, *supra* note 15, at 130 (noting the argument that "because judges will often, by misadventure, produce unjust decisions they should make no effort to produce just ones"). Some commentators have argued that, overall, the Court has done well in protecting basic rights. *See, e.g.*, M. Perry, *supra* note 34, at 117; Wasby, *Arrogation of Power Accountability: Judicial Imperialism Revisited*, 65 Judicature 209, 210 (1981).

75. Originalists argue that Brown v. Board of Education was wrongly decided because the Framers did not intend to desegregate schools. *See, e.g.*, R. Berger, *supra* note 3, at 117–133.

76. Originalists oppose a judicially created right of privacy. *See, e.g.*, Bork, *supra* note 3, at 8–9.

77. Earlier, in Chapter 5, I discussed why it was unlikely that the legislature would have produced numerous key reforms, such as desegregating the South, reapportioning legislatures, or protecting the rights of criminal defendants. *See* Chapter 5, *supra*, text accompanying notes 21–30.

78. 60 U.S. (19 How.) 393 (1857) ("No one, we presume, supposes that any change in public opinion or feeling . . . should induce the Court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted").

79. *See* discussion in Chapter 4, *supra*, text accompanying notes 49–53.

80. *See* T. Dye & H. Ziegler, *The Irony of Democracy* (2d ed. 1980) (describing how government officials, including judges, represent elites).

81. *See* A. Paul, *The Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895* (1960) (describing prevailing support for laissez-faire ideology at the end of the nineteenth century).

82. *The Federalist No. 78*, at 490 (A. Hamilton) (B. Wright ed. 1961).

83. J. Choper, *Judicial Review and the National Political Process* 56 (1980).

84. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. Pub. L. 279, 284–285 (1957).

85. *See* H. Simon, *Administrative Behavior* 110–153 (1957); Sarbin & Allen, *Role Theory*, in *Handbook of Social Psychology* 488–558 (G. Lindsay ed. 1968).

86. *See* Kelman, *Three Processes of Social Influence*, in *Current Perspectives in Social Psychology* 454 (E. Hollander & R. Hunt eds. 1973); Reeder, Donahue & Biblarz, *Conceptions of Self and Others*, in *Society and Self* 69 (B. Stoodley ed. 1962).

87. *See* discussion in Chapter 5, *supra*, text accompanying notes 37–71.

88. Bennett, *supra* note 2, at 479.

89. *Id.*, at 484.

90. 2 U.S. (2 Dall.) 419 (1793).

91. 60 U.S. (19 How.) 393 (1857).

92. 157 U.S. 429 (1895).

93. 400 U.S. 112 (1970).

94. *See, e.g.*, Carter, *supra* note 5, at 842–844; J. Choper, *supra* note 83.

95. R. Dworkin, *supra* note 15, at 148.

96. 323 U.S. 214 (1944).

97. Report of the Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982); M. Grodzins, *Americans Betrayed* (1949); Dembitz, *Racial Discrimination and the Military Judgment*, 45 Colum. L. Rev. (1945); Rostow, *The Japanese American Cases: A Disaster*, in the *Sovereign Perspective* 193 (1962).

98. *See, e.g.*, Chemerinsky, *Ending the Dual System of American Public Education: The Urgent Need for Legislative Action*, 32 DePaul L. Rev. 77 (1982); Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars*, 1975 Wash. U. L. Q. 535.

99. I recognize, however, that the Supreme Court's decisions can legitimize undesirable practices. For instance, the Korematsu decisions approved the relocation of Japanese Americans and put the judiciary's stamp of approval on the action. When I say that it is almost as if the judiciary did not exist at all, I am speaking of this in terms of whether the action would have occurred.

100. 60 U.S. (19 How.) 393 (1857).

CHAPTER 7

1. Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 Hastings Const. L. Q. 257, 259 (1982).

2. Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 Iowa L. Rev. 711, 734–736 (1982).

3. Shaman, *supra* note 1, at 260.

4. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1790).

5. 3 U.S. (3 Dall.), at 388; *see also* Grey, *Do We Have an Unwritten Constitution?* 27 Stan. L. Rev. 703 (1975); Grey, *The Origins of the Unwritten Constitution*, 30 Stan. L. Rev. 843 (1978).

6. Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810).

7. *Id.*, at 135, 139, 143; *see* Shaman, *supra* note 1, at 260.

8. 60 U.S. (19 How.) 393 (1857).

9. *See* P. Finkelman, *An Imperfect Union: Slavery, Federalism and Comity* (1981); R. Cover, *Justice Accused* (1975).

10. Shaman, *supra* note 1, at 260.

11. *See, e.g.*, C. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* (1979); R. Cover, *supra* note 9, at 131 (describing the demise of natural law theories).

12. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E. C. Knight Co., 156 U.S. 1 (1895) (view that there is a zone of activities reserved to the states).

13. 22 U.S. (9 Wheat.) 1 (1824).

14. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton R. R., 295 U.S. 330 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

15. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. E. C. Knight Co., 156 U.S. 1 (1895).

16. *See, e.g.*, A. L. A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton R. R., 295 U.S. 330 (1935).

17. *See, e.g.*, Hammer v. Dagenhart, 247 U.S. 251 (1918) (declaring unconstitutional a congressional law excluding from interstate commerce the products of child labor).

18. *See* 1, 2 W. Crosskey, *Politics and the Constitution in the History of the United States* (1953).

19. 165 U.S. 578 (1897).

20. 262 U.S. 390, 399 (1923).

21. *Id.*, at 399.

22. 268 U.S. 510, 535 (1925).

23. *See, e.g.*, Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908); Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (decisions striking down state economic regulations as a violation of substantive due process).

24. G. Gunther, *Constitutional Law* 453 (11th ed. 1985) ("[D]uring the Lochner era . . . nearly 200 regulations were struck down").

25. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942) (narrowly construing congressional commerce power and invalidating federal regulations).

26. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937); United States v. Carolene Products Co., 304 U.S. 144 (1938); Williamson v. Lee Optical Co., 348 U.S. 483 (1955) (minimal protection of economic liberties under the due process clause of the Fourteenth Amendment).

27. The judiciary's position of deference to the political process as to economic matters, but active protection of civil liberties and "insular minorities," was articulated in the famous footnote in United States v. Carolene Products Co., 304 U.S. 144, 152–153 n. 4 (1938).

28. *See* Betts v. Brady, 316 U.S. 455 (1942) (the Constitution does not require the provision of counsel to indigent defendants in state proceedings); overruled by Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

29. *See* Wolfe v. Colorado, 338 U.S. 25 (1949) (the Constitution does not require the exclusion of illegally obtained evidence in state proceedings); overruled by Mapp v. Ohio, 367 U.S. 643, 653–655 (1961) (the exclusionary rule applies to states).

30. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (articulating test for determining whether aid to parochial schools violates the First Amendment); Committee for Public Education v. Regan, 444 U.S. 646 (1980) (invalidating several forms of aid to parochial schools); Engel v. Vitale, 370 U.S. 421 (1962) (invalidating school prayer).

31. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (protecting the right to travel but declaring "[W]e have no occasion to ascribe the source of this right"); United States v. Guest, 363 U.S. 745, 758 (1966) (protecting the right to travel but declaring "that right finds no explicit mention in the Constitution").

32. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy includes a woman's choice of whether to terminate a pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to privacy includes a married couple's use of contraceptives); *see* Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L. J. 1, 8–9 (1971) (text of Constitution does not protect privacy and Framers did not intend such protection).

33. *See* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?: The*

Original Understanding, 2 Stan. L. Rev. 5 (1949) (arguing that the Framers of the Fourteenth Amendment did not intent to apply the Bill of Rights to the states).

34. *See, e.g.*, Harper v. Board of Elections, 383 U.S. 663, 669 (1966) (concept of equal protection changes over time); Brown v. Board of Education, 347 U.S. 483, 491–492 (1954) (cannot look to world as it existed when the Fourteenth Amendment was ratified in determining its meaning); McCullum v. Board of Education, 334 U.S. 203, 237–238 (1948) (irrelevancy of Framers' intent to decide question of what is secular and what is sectarian); United States v. Classic, 313 U.S. 315–316 (1941) (Framers' intent not determinative in constitutional interpretation).

35. *See, e.g.*, Conkle, *The Legitimacy of Judicial Review in Individual Rights Cases: Michael Perry's Constitutional Theory and Beyond*, 69 Minn. L. Rev. 587, 588 (1985) (expansive nonoriginalist review "would undermine . . . [the Court's] fragile legitimacy [and] . . . the Court's constitutional decisions would face all-but-certain popular repudiation"); *see also* J. Choper, *Judicial Review and the National Political Process* 55–59 (1980); A. Bickel, *The Least Dangerous Branch* 201–268 (1962) (the importance of the Court acting to preserve its credibility).

36. *See* U. Rosenthal, *Political Order* 110 (1978) (legitimacy gains public acceptance of even unpleasant policies); H. Eckstein, *The Evaluation of Political Performance: Problems and Dimensions* 52, 62 (1971) (importance of legitimacy in gaining compliance); C. Mueller, *The Politics of Communication* 129–130 (1973) (importance of legitimacy).

37. C. Mueller, *supra* note 36, at 130.

38. U. Rosenthal, *supra* note 36, at 110.

39. *See, e.g.*, Conkle, *supra* note 35, at 588 (expansive nonoriginalist review would "undermine [the Court's] fragile legitimacy"); J. Choper, *supra* note 35, at 55–59; A. Bickel, *supra* note 35, at 201–268.

40. *See* J. Choper, *supra* note 35, at 55–59; A. Bickel, *supra* note 35, at 201–268.

41. Conkle, *supra* note 35, at 588.

42. Saphire, *Making Noninterpretivism Respectable: Michael J. Perry's Contribution to Constitutional Theory*, 81 Mich. L. Rev. 781, 796 (1983) ("[A] candid confession of the policymaking nature of noninterpretive review may not only undermine its ability to protect human rights . . . but also may adversely affect its ability to perform its interpretive function").

43. *See, e.g.*, Conkle, *supra* note 35, at 588 (describing the Court's "fragile legitimacy" with no explanation of why it should be perceived as fragile or why public perception of the Court's policy-making role would cause it to lose its legitimacy).

44. Lerner, *The Constitution and the Court as Symbols*, 46 Yale L. J. 1290, 1314 (1937).

45. Gibbons, *Keynote Address*, 56 N.Y.U. L. Rev. 260, 271 (1981).

46. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Board v. Alton R. R., 295 U.S. 330 (1935).

47. For a discussion of the events surrounding the Court packing plan, *see* L. Baker, *Back to Back: The Duel between FDR and the Supreme Court* (1967); R. Jackson, *The Struggle for Judicial Supremacy* (1941); Leuchtenburg, *The Origins of Franklin D. Roosevelt's Court-Packing Plan*, 1966 Sup. Ct. Rev. 347.

48. Sen. Jud. Comm., S. 711, 75th Cong., 1st Sess. 13–14 (1937).

49. *See* McKay, *Judicial Review in a Liberal Democracy*, in *Liberal Democracy*, Nomos XXV, 121, 126 (J. Pennock & J. Chapman eds. 1983).

50. J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 47–48 (1980).

51. *See* C. Mueller, *supra* note 36, at 133–135; Bensman, *Max Weber's Concept of Legitimacy: An Appraisal*, in *Conflict and Control* 42–47 (A. Vidich & R. Glassman eds. 1979); Blau, *Critical Remarks on Weber's Theory of Authority*, 57 Am. Pol. Sci. Rev. 315, 316 (1963).

52. *See* Lane, *The Legitimacy Bias: Conservative Man in Market and State*, in *Legitimation of Regimes* 69 (B. Denitch ed. 1979) ("[F]amiliarity . . . represents a powerful force making for loyalty to a known form of government and a known form of economic behavior. . . . There may be psychological bases for the preference for the familiar").

53. *See* Lerner, *supra* note 44, at 1294; Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 3 (1984) ("[I]t has been, virtually from the moment of its ratification, a sacred symbol").

54. *See* C. Mueller, *supra* note 36, at 135 (positive results increase legitimacy); D. Easton, *A Systems Analysis of Political Life* 208, 278–310 (1965).

55. *See* Lane, *supra* note 52, at 69 (describing familiar practices as a basis for legitimacy).

56. A. Cox, *The Role of the Supreme Court in American Government* 104 (1976).

57. *See, e.g.*, Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 736 (1984) ("Why bother with a constitution at all if it is to be rewritten anew in each generation?").

58. J. Choper, *supra* note 35, at 60–128.

59. J. Ely, *supra* note 50, at 73–180.

60. M. Perry, *The Constitution, the Courts, and Human Rights* 146–162 (1982).

61. 372 U.S. 335 (1963) (Constitution requires provision of counsel to indigents accused of a felony).

62. Reynolds v. Sims, 377 U.S. 533 (1964) (Constitution requires standard of one person/one vote).

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About the Author

ERWIN CHEMERINSKY is a Professor of Law at the University of Southern California Law Center.

Professor. Chemerinsky has published widely in the area of constitutional law. His articles have appeared in journals such as the *Boston University Law Review*, the *Michigan Law Review*, the *Northwestern Law Review*, the *Southern California Law Review*, and the *Texas Law Review*.

Professor Chemerinsky holds a B.S. degree from Northwestern University and a J.D. from Harvard Law School.