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Legitimacy of the Constitutional Judge and Theories of Interpretation in the United States

William B. Fisch
University of Missouri School of Law, fischw@missouri.edu

Richard S. Kay
University of Connectiuct School of Law, richard.kay@law.uconn.edu

WILLIAM B. FISCH & RICHARD S. KAY

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The paper addresses the sources of legitimacy of a judge exercising the power to declare acts of government invalid on constitutional grounds, and their relationship to theories of interpretation of the constitutional texts.

In perhaps no other country is the legitimacy of the constitutional judge a more important issue than in the United States. Constitutional judicial review of acts of the government has had, and continues to have, a profound effect on the extent and character of public action. The constitutional decisions of the courts govern, to a significant degree, some of the most intensely controversial questions of public policy. American courts actively police the role of government with respect to criminal conduct and punishment, racial discrimination and remedies for such discrimination, and the regulation of reproductive and sexual matters, among many other subjects. It is, in fact, fair to say the judicial penetration of many of these topics has been so complete that the very agenda of public concerns is, in substantial measure, defined by the process of litigation and judicial decision.

What legitimates this critical exercise of public power? The word "legitimacy" has been used for a number of purposes, ranging from service as a synonym for conformity to positive law, to identification of the intrinsic moral rightness of an action. We mean by legitimacy that quality of an action or decision that causes it to be accepted as authoritative by the human beings who are in a position to act in response to it. That is, we use the term to describe a quality of a legal action within a political and social context.[1] Given this definition, there is little doubt that the Supreme Court of the United States, as

WILLIAM B. FISCH is Isador Loeb Professor of Law, University of Missouri-Columbia.
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RICHARD S. KAY is William J. Brennan Professor of Law, University of Connecticut.

1. See Kay, "The Creation of Constitutions in Canada and the United States," 7 *Canada-U.S. L. J.* 111, 116-122 (1984).

the principal constitutional tribunal, exercises legitimate authority. The very success of the Court in altering public decisionmaking is powerful evidence of its acceptance. The difficulty, as will be made clear, is identifying the source and character of that legitimacy.

It is useful at the outset to restate some basic principles of judicial constitutional review in American law — "givens" in the debate over legitimacy, to which the competing theories refer with satisfaction or dismay — to provide the setting for a discussion of interpretive theory. Our concern in this paper will be the *federal* constitution, and the work of the United States Supreme Court as the court of last resort for constitutional questions for both state and federal judicial systems. They are not the only "constitutional judges," however; each of the 50 constituent states has its own constitution, its own complete judicial system, and its own method of selecting judges.[2] All judges must apply the federal constitution to cases before them,[3] and each state judiciary exercises a parallel power under its own constitution.[4] The concept of "constitutional judge" in the United States, therefore, is a complex one.[5]

I. The Judicial Power of Constitutional Review under the United States Constitution: The Basic Framework

A. *Concrete, not Abstract Review*

The U.S. Constitution does not provide expressly for judicial constitutional review, nor is the implication from its language overwhelming.[6] Nonetheless it was assumed by most participants in the

2. Only three states (all among the original thirteen) still follow the federal model of permanent appointment; all others utilize limited terms and some form of electoral selection or review, such as direct partisan election, nonpartisan election, initial appointment followed by periodic nonpartisan retention election, and the like. For details, see Council of State Governments, *The Book of the States*, tables 4.1, 4.2 and 4.4 (1992).

3. Art. VI par. 2, the so-called supremacy clause:

> This Constitution, and the Law of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. For a review of the process of consolidating this consensus, see Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harv. L. Rev.* 129, 132 ff. (1893).

5. To be sure, lower federal judges and state court judges appear, when applying the federal constitution, predominantly in the common-law mode of reliance upon precedents of the Supreme Court, see Levinson, "On Positivism and Potted Plants: 'Inferior' Judges and the Task of Constitutional Intepretation," 25 *Conn. L. Rev.* 843 (1993). However, the Court's decisions themselves are incomplete and in need of interpretation, so that the room for exercise of judgment by these other judges is often large.

6. See, for example, Alexander Bickel, *The Least Dangerous Branch* 1-13 (1962).

drafting[7] and ratification[8] of the original document that some such power would exist under the text as proposed.[9] More precise contours of it were elaborated by the Court in the first third of the 19th century under Chief Justice Marshall. In *Marbury v. Madison*[10] the Court struck down an Act of Congress which was interpreted to give the Court itself competence over certain cases which were not contemplated for it in Art. III §2. In doing so the Court enunciated a seemingly straightforward rationale for the power: (1) the Constitution is intended to be law which binds all other government agencies as well as the courts; (2) an essential function of courts is to determine what the law is, in order to decide cases properly before them; and (3) therefore the Court must apply the Constitution, as the highest law in the system, in place of any inconsistent statute or governmental act.[11]

An important corollary of this reasoning is that the Constitution (like other law) is judicially applicable, at least in the federal courts, only in concrete cases in which the constitutional issue is raised between parties having specific, adverse interests in its resolution.[12] The Supreme Court, primarily exercising prudential self-regulation but in this century relying increasingly on the language of Art. III §2 which uses the terms "cases" and "controversies" to define the categories of the federal judicial power,[13] has developed an extensive array

7. Max Farrand, *The Framing of the Constitution of the United States* 156-7 (1913); see the participants' notes collected in, Jane Butzner (ed.) *Constitutional Chaff* 147-152 (1941).

8. For ratification: e.g., *The Federalist* No. 78, at 464 (Rossiter ed. 1961) (A. Hamilton); against ratification: "Brutus," in Herbert Storing (ed.), 2 *The Complete Anti-Federalist* 417 ff. (1981); see, e.g., Raoul Berger, *Congress v. The Supreme Court* 120 ff. (1969).

9. Strongest textual inferences are drawn from Art. III § 2 cl. 1, extending the judicial power of the U.S. to cases "arising under this Constitution", and Art. VI par. 2, the Supremacy Clause, quoted n. 3 above.

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

11. This conception of judicial constitutional review as an integral element of the judicial law-finding process, and of the Constitution as supreme ordinary law, drew heavily on the English common law tradition. On the relevance of the common law tradition to the Framers' conception of judicial review see Powell, "The Original Understanding of Original Intent," 98 *Harv. L. Rev.* 885, 894 ff. (1985). For an argument that Marbury in this sense did indeed effect a major transformation of the earlier understanding, in that it called for routine application of a document originally expected and intended to be enforced only as a last resort against clear violation, see Sylvia Snowiss, *Judicial Review and the Law of the Constitution* (1990), critically reviewed by Newmyer in 9 *Const. Comm.* 126 (1992). Marbury is discussed further infra, text at notes 40 ff.

12. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.

Marbury v. Madison, 5 U.S. at 170.

13. For persuasive argument that much of this reliance on the constitutional language is misplaced from an historical perspective, see, e.g., Berger, "Standing to Sue in Public Actions: Is it a Constitutional Requirement?," 78 *Yale L. J.* 816 (1969); Nichol, "Ripeness and the Constitution," 54 *U. Chi. L. Rev.* 153 (1987).

of rules of "justiciability" designed to define what types of disputes are suitable for judicial determination, and has insisted on applying those rules to constitutional cases as well as to all others.[14] Thus the "abstract norm control" practiced in the modern German and French constitutional tribunals has never been available in the federal courts.[15] The doctrines of justiciability are highly technical and certainly not well understood in the American public, and their specific applications often give rise to controversy and leave room for suspicion of manipulation. They are nonetheless an inescapable staple of constitutional advocacy in the courts.

B. Selection and Retention of Federal Judges

All federal judges, including the justices of the Supreme Court, are appointed by the President subject to the "advice and consent" of the Senate (Art. II §2 par. 2).[16] No formal qualifications are specified, though in fact full legal training has been an all but universal requirement and most federal judges have been active to some degree in public life. That presidents take politics into account in making nominations is a given; in the twentieth-century,[17] the Senate has normally deferred to presidential choice among professionally and intellectually qualified candidates, but occasionally, and particularly with respect to Supreme Court nominees, it refuses confirmation on the basis of the senators' perceptions of the nominees' views and/or the style in which they are presented.[18] The most controversial rejection in recent times came in 1987 with the nomination of Judge Robert H. Bork, which gave rise to an enormous partisan public debate — not always distinguished by accuracy on either side — centered not only on his well-documented and widely published "originalist" theory of constitutional interpretation but also, perhaps more promi-

14. For a general treatment see John Nowak & Ronald Rotunda, *Constitutional Law* § 2.12 (4th ed. 1991). These are principles governing the jurisdiction of all federal courts; the Supreme Court itself is unique, in that even within this framework its appellate jurisdiction is now entirely discretionary, see 28 U.S.C. §§ 1254, 1257 (1988).

15. Certain state courts, however, are empowered to render advisory opinions. See, e.g., Mass. Const. Part II, ch. 3, art. 2.

16. The Senate is the upper house of the federal legislature, consisting of 2 senators from each state elected by popular vote, with 6-year terms.

17. The Senate was much less passive in the constitution's first century, rejecting 25% of those nominated, see Freund, "Appointment of Justices: Some Historical Perspectives," 101 *Harv. L. Rev.* 1146, 1146-51 (1988); Monaghan, "The Confirmation Process: Law or Politics?," 101 *Harv. L. Rev.* 1202 (1988).

18. See Henry Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (2d ed. 1985); Simson, "Taking the Court Seriously: A Proposed Approach to Senate Confirmation of Supreme Court Nominees," 7 *Const. Comm.* 283 (1990); Ely, "Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different Than Legislatures," 77 *Va. L. Rev.* 833, 869-78 (1991).

nently, on his application of that theory to criticize particular Court decisions.[19]

The Constitution specifies in Art. III §1 that federal judges serve "during good Behavior" and that their salaries cannot be diminished while in office. These were explicitly intended to protect the judges against undue political influence.[20] Removal of a federal judge can only[21] be accomplished by the cumbersome method of impeachment (Art. II §4), in which the House of Representatives makes charges of "treason, bribery or other high crimes and misdemeanors" and the Senate sits in judgment on those charges. A total of seven lower federal court judges —including three in the last 10 years — have been removed by this process, almost always for misconduct or gross incompetence;[22] only one Supreme Court justice has been formally charged ("impeached") and none has been convicted.[23]

C. *Congressional Control of Federal Court Jurisdiction*

A further explicit parameter of the power of judicial constitutional review is the power of Congress to regulate the jurisdiction of the federal courts. Art. III contains two provisions granting such power: *first*, the power to create lower federal courts (§1), which is understood to imply complete control over their jurisdiction,[24] and

19. For a sampling of the debate, including texts of the presidential and congressional reports on the nomination, see "The Bork Nomination," 9 *Cardozo L. Rev.* 1-530 (1989); for a sampling of more scholarly discussion of the appointment process and the role of ideology, see Symposium: "Confirmation Controversy: The Selection of a Supreme Court Justice," 84 *Northwestern L. Rev.* 832-1046 and 1121-1228 (1990). The judge's own popular defense of his positions and critique of the nomination process, Robert Bork, *The Tempting of America: The Political Seduction of the Law* (1990), received multiple reviews in the Northwestern Law Review symposium cited above, among which see Kay, "The Bork Nomination and the Definition of 'The Constitution'," id. at 1190.

20. See *The Federalist* No. 78, supra n. 8, at p. 465.

21. See Nixon v. United States, 113 S.Ct. 732, 738-9 (1993), citing *Federalist* 81:

> . . .(J)udicial review [of impeachment proceedings] would be inconsistent with the Framers' insistence that our system be one of checks and balances. In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. . .. [Judge] Nixon's argument would place final reviewing authority with respect to impeachments in the hands of the same body that the impeachment process is designed to regulate.

22. On the recent impeachments of Judges Claiborne (felony tax evasion), Hastings (bribery and perjury) and Nixon (perjury), see 1 Ronald Rotunda & John Nowak, *Treatise on Constitutional Law* 119-21 (2d ed. 1992).

23. On the impeachment of Justice Samuel Chase in 1803-5, see Rauol Berger, *Impeachment: The Constitutional Problems*, ch. VIII (1973); George Haskins and Herbert Johnson, *Foundations of Power: John Marshall 1801-15*, ch. VII (History of the Supreme Court of the United States, vol. II, 1981).

24. See Martin Redish, *Federal Jurisdiction* 29 (2d ed. 1990). For the view that at least several categories of jurisdiction under Art. III § 2, particularly those denominated "cases", may not be removed entirely from the federal judiciary — an argument made by Story in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816) but never embraced by the Court in a holding — see Amar, "A Neo-Federalist View of Article

second, the power to make exceptions to and regulations of the appellate jurisdiction of the Supreme Court (§2 par. 2). In fact Congress has seldom exercised these powers to restrict or correct an exercise of the power of constitutional review as such;[25] but a statute was sustained in the 19th century which removed a specific case already pending before the Court and was almost certainly motivated by the expected judicial result.[26]

D. Amendment of the Text

Finally one must note the extraordinarily difficult amendment process set forth in Art. V of the Constitution. It requires that *proposals* for amendment be made either by Congress directly or by a convention called by Congress on application from the states; but Congress must propose by a two-thirds majority in each house, and the application for a convention must be made by two thirds of the states. No successful application for a constitutional convention has yet been made, and the process is often seen as so fraught with legal uncertainties[27] — exemplified by the runaway character of the Convention that produced the original document itself[28] — that many have sought to preempt or otherwise avoid it if at all possible. *Ratification* or formal approval of proposed amendments — the ultimate democratic sanction which might be understood to legitimate an amendment despite any irregularities in the proposal process[29] — requires a still greater majority of the states, namely three fourths. The process has been successful only 18 times in 200 years, producing 27 articles of amendment.

Of the amendments four can be seen as directly corrective of controversial Supreme Court decisions: the 11th, excluding federal court jurisdiction over suits brought by citizens of one state against another state;[30] the 14th (§1 cl. 1), providing a minimum definition of national and state citizenship;[31] the 16th, authorizing the federal

III: Separating the Two Tiers of Federal Jurisdiction," 65 *B.U. L. Rev.* 205 (1985); Engdahl, "What's In A Name? The Constitutionality of Multiple Supreme Courts," 66 *Ind. L. J.* 457, 478-9 n.111 (1991).

25. On the proposition that Congress may not use the jurisdiction-limiting power to impose its own view of the Constitution, see Nowak & Rotunda, supra n. 14, § 2.9.

26. Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869).

27. For an argument that the modern uncertainties were not present in the historical practice contemplated by the Framers, see Russell Caplan, *Constitutional Brinksmanship* (1988), critically reviewed by Kay, 7 *Const. Comm.* 434 (1990).

28. It was originally called to consider amendments to its predecessor the Articles of Confederation, and therefore clearly exceeded its mandate, see, e.g., Kay, "The Illegality of the Constitution," 4 *Const. Comm.* 57 (1987).

29. On the legitimating role of the original ratification process see, e.g., Kay, supra n. 28, at 74-5, with further references.

30. It reversed Chisholm v. Georgia, 2 Dall. (2 U.S.) 419 (1793).

31. It reversed, after a bloody civil war, the most controversial decision of all: Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), which held inter alia that a black person was incapable under the Constitution of becoming a U.S. citizen.

government to impose an income tax;[32] and the 26th, prohibiting discrimination against persons 18 years old or older with respect to voting rights.[33]

II. The Problem of Legitimacy of Constitutional Adjudication

A. *The Constitution as the Source of Judicial Legitimacy*

At the center of this system is the Constitution itself, and it is the Constitution that provides the most obvious source of legitimacy for the exercise of constitutional judicial review. The bulk of this report will be devoted to the various ways in which the courts and academic commentators have defined the relationship between the Constitution and the process of judical decision. As a background to that discussion, however, it may be useful to consider the character of that relationship in more general terms, as well as its role in establishing the legitimacy of judicial review.

Robert Bork suggested, in connection with the constitutional decisions of the Supreme Court, that "the way an institution advertises tells you what it thinks its customers demand."[34] If so, the centrality of the constitutional text in establishing the legitimacy of the Court's judgments is obvious. No matter how contestable the Court's decision, and no matter how little the Constitution's text or history appears actually to have been employed in its reasoning, the Constitution is always cited as the controlling source of judgment.

The legitimacy of that written Constitution of 1787-89 as amended, is itself a largely unquestioned postulate of the American political and legal system. With very few exceptions, to acknowledge that the Constitution provides a rule of decision in a particular con-

32. It reversed Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 158 U.S. 601 (1895).

33. It reversed Oregon v. Mitchell, 400 U.S. 112 (1970), which had held that Congress lacked power to impose such restrictions on the states by legislation.

34. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Ind. L. J.* 1, 4 (1971).

troversy is to conclude the argument.[35] Constitution-worship in the United States has a long history.[36]

The attitude of much of American society to the Constitution was apparent a few years ago in the national observation of the two hundredth anniversary of its writing and ratification. That founding event was sometimes commemorated in terms that would not have been inappropriate to describe an act of divine lawgiving. At the principal celebration in Philadelphia on September 17, 1987, President Reagan said the Constitution was a human covenant "and beyond that a covenant with the Supreme Being to whom our Founding Fathers did constantly appeal for assistance."[37] The indubitable rightness of the constitutional rules was regularly reiterated. Many seized the chance to quote Gladstone's description of the Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man."[38] And lest it be thought that it was anything apart from the constitutional text itself which was the center of such homage, the country was flooded with millions of pocket sized copies of the Constitution and people were enjoined to read and study it.[39]

The legitimacy of the constitutional judge, therefore, seems largely parasitic on the self-evident legitimacy of the Constitution,

35. See Maltz, "The Supreme Court and the Quality of Political Dialogue," 5 *Const. Comm.* 375, 388 (1981). The major exceptions to this almost universal concession to the political legitimacy of the constitutional text have been founded on questions of race. In the years preceding the Civil War many of the opponents of slavery, quite rightly, pointed out that the Constitution was tainted by its barely masked accommodation of that pernicious institution. See Phillip Paludan, *A Covenant with Death: The Constitution, Law & Equality in The Civil War Era* (1975). More recently, Justice Thurgood Marshall injected a skeptical and critical note in the otherwise bland and self-congratulatory atmosphere of the bicentennial anniversary of the Constitution by recalling this major moral blemish on the creation of that document. Taylor, "Marshall Sounds Critical Note on Bicentennial," *New York Times*, May 7, 1987, p. A1 col 4.

36. See generally Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American History* (1980).

37. Remarks at the "We the People" Bicentennial Celebration in Philadelphia Pennsylvania, September 17, 1987, 2 *Public Papers of the President of the United States: Ronald Reagan* 1043, 1044 (1989). The divine origin of the Constitution is a persistent theme in American political history. See Kammen, supra n. 36, at 225 n. 17.

38. See, e.g., Twardy, "Conn. Opinion: Learning & Living the Constitution," *New York Times*, June 7, 1987, sec. 11CN36, p. 36, col. 1. Gladstone's remark was published in Gladstone, "Kin Beyond the Sea," 127 *North Amer. Rev.* 179, 185 (September-October 1978).

39. The Chief Justice of the Texas Supreme Court in a bicentennial speech said that "we owe it to ourselves and our families to know more about [the Constitution], to know it, to understand it and above all live up to it. If we would burn these truths into the hearts of every American we would all be enriched." *United Press International* wire story, Sept. 18, 1987, available in NEXIS Archive file. On the distribution of copies of the Constitution, see Vobejda, "Year of the Constitution: A Different Sort of Party: Event Taking Hold on Grass-Roots America," *The Washington Post*, January 2, 1987, p. A1.

and interpretation of the text is the means by which the judge is legitimated. This essential connection was nicely captured in the judgment of Chief Justice Marshall in *Marbury v. Madison*, which grounded that authority on the necessity of executing the commands of the Constitution. Once the postulates were accepted that the Constitution is applicable law and superior to any inconsistent rule of ordinary law,[40] everything else followed from the interpretive role of courts:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must *of necessity* expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the courts must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution disregarding the law; the court must determine which of these conflicting rules govern the case. *This is the very essence of the judicial duty.* If, then the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution and not such ordinary act, must govern the case to which they both apply.[41]

The role of the judiciary in this scheme, it will be noted, is auxiliary. The Constitution itself extends the judicial power to cases "arising under. . . the Constitution," and Marshall noted that this grant assumes that the Constitution will be relevant to the decision of some cases. "And if they can open it at all, what part of it are they forbidden to read or obey?"[42] The Constitution directs the judges to take an oath to support it but, Marshall asked, how can they uphold this oath if it does not govern the decision of the cases brought before them? "How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!"[43]

The sum of these arguments is that the system of law established by the Constitution demands that the judges regard themselves as the agencies whereby the decisions embodied in that document are translated into effective rules of conduct. The Constitution was to be "a rule for the government of *courts* as well as of the legislature."[44]

40. See text at supra n. 10.
41. 5 U.S. at 177-8 (emphasis supplied).
42. Id. at 179.
43. Id. at 180.
44. Id. at 180 (emphasis supplied).

B. The Risks of Interpretation and Misinterpretation

The conception of constitutional decisionmaking just described posits the judge as the mere medium through which the authoritative decisions about the limits of governmental power made in the enactment of the Constitution are worked out. Nothing could be more subversive of this model of legitimacy than the suspicion that the judge would exercise an independent discretion under the pretense of mere interpretation. Thomas Jefferson expressed this concern when he said "[o]ur peculiar security is in the possession of a written Constitution, let us not make it a blank paper by construction."[45] Rather, to use another figure of Jefferson, the judge must be "a mere machine."[46]

Obviously this kind of adjudication was far easier for human beings to describe than to achieve. It has been noted indeed that *Marbury* was an atypical instance of constitutional adjudication, because it involved the application of a technical provision concerning the appellate jurisdiction of the Supreme Court.[47] There it was (barely) possible to speak with some confidence of a choice between deciding the "case conformably to the law, disregarding the Constitution; or conformably to the Constitution disregarding the law."[48] The question necessarily appears in a different light when an official action is challenged as "impairing the obligation of contracts"[49] or "prohibiting the free exercise" of religion[50] or having "deprived [a person] of . . . liberty. . . without due process of law."[51] It is far harder, in interpreting such apparently open-ended clauses, for the constitutional judge to be "a mere machine," suppressing any personal value or preference.

Scholarly attacks on the judges' capacity to restrict themselves to simple execution of the constitutional commands have been thoroughgoing. The American legal realists of the middle of the twentieth century, who discounted the governing influence of rules in adjudication, did not spare constitutional law. They found the constitutional judge equally subject to human nature and unlikely to be constrainable by abstract rules, even if they are embedded in a constitutional text.[52] Perhaps even more disturbing to the *Marbury*

45. Quoted in Powell, supra n. 11, at 893 n.40. Further expressions of the deep early suspicion of judicial interpretation are found in id. at 893-94.

46. Quoted in Gordon Wood, *The Creation of the American Republic 1776-1787* at 161 (1969).

47. Grey, "Do We Have an Unwritten Constitution?," 27 *Stan. L. Rev.* 703 (1978).

48. 5 U.S. at 178.

49. Art. I, s. 10, cl. 1.

50. Amend. I.

51. Amends. V and XIV § 1.

52. See Llewellyn, "The Constitution as an Institution," 24 *Colum. L. Rev.* 1 (1934). For a more recent example of the same kind of criticism see Chemerinsky, "The Supreme Court, 1988 Term – Foreword: The Vanishing Constitution," 103 *Harv.*

model has been the adoption by constitutional critics of the general doubts raised by literary theorists as to the possibility of a single, stable discernable meaning in a text of any kind.[53] The work of the United States Supreme Court provides ample evidence for such skepticism. The influence of the written Constitution in many of the best known (and often most controversial) judgments of that Court is, if present, certainly well concealed.[54] If the connection between the Constitution and the results of constitutional adjudication is severed, however, the latter is deprived of its most plausible and most commonly accepted source of legitimacy.

C. *The Absence of External Constraints on Judicial Discretion*

This loss is especially important in light of the anomalous character of the judiciary in the political-legal regime established by the Constitution. The Constitution incorporates both structural and substantive constraints on government to prevent encroachment on liberty.[55] Judicial review is an important mechanism for enforcing those constraints on the other branches, but is not itself subject to similar external constraints, and thus is in serious tension with the underlying values that support the constitutional system.

The Constitution relies in at least two ways on the design and structure of governmental institutions to minimize the likelihood of despotic actions. First and most obvious is electoral responsibility, the requirement that important government officials be elected for fixed terms. The holders of state power must regularly appear before the public to give an account of their actions and if that account is found unsatisfactory, they are replaced. This aspect of the constitutional system necessarily inhibits the adoption or maintenance of unpopular measures. Madison, defending the proposed Constitution in *The Federalist*, insisted that "a dependence upon the people is, no doubt, the primary control on the government."[56]

A second structural constraint is often called "checks and balances". Political power was to be distributed among independent agencies, which, if they were to act, would have to overcome mutual jealousies and the difficulties of coordination. Madison's exposition of the idea is well known:

L. Rev. 43, 101 (1989): "The Court should stop pretending that objective Constitutional principles exist apart from the preferences of the justices".

53. See, e.g., Levinson, "Law as Literature," 60 *Tex. L. Rev.* 373 (1982).

54. This is a given among commentators of all persuasions. See, e.g., Raoul Berger, *Government by Judiciary* (1972); Brest, "The Misconceived Quest for the Original Understanding," 60 *B.U. L. Rev.* 204, 223-24 (1980).

55. On the general question of substantive and structural constitutional restrictions, see Kay, "Substance and Structure as Constitutional Protections: Centennial Comparisons," [1989] *Public Law* 428.

56. *The Federalist* No. 51, supra n. 8, at 323.

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others . . . . Ambition must be made to counteract ambition. The interests of the man must be connected with the constitutional restraints of the place.[57]

This principle is worked out through the dispersal of and sharing of the powers of the federal government among executive, legislative and judicial branches, as well as in the vertical distribution of powers between state and federal governments.

Beyond these structural inhibitions there are numerous substantive limitations on governmental conduct expressed or implied in the text. There is an all-embracing limit on the authority of the federal government, in the sense that the text provides an exclusive list of permissible powers. Any action not attributable to a granted power is forbidden.[58] In addition there are specific limitations on actions that may fall within the categorical grants. Prominent among these limitations are those specifying individual rights to be protected against government interference.

For the "political" branches of government, the legislative and executive, this combination of structural and substantive constitutional restraints, many of which are enforceable by the courts, creates a formidable barrier to abusive action. The political departments of the government can thus be said to act legitimately when they act within the constitutionally specified areas of competence, they do not transgress substantive rules laid down to limit that competence, and they make themselves accountable to people for the rightness of their decisions.

The judicial department, by contrast, is exempted from most of these external constraints. With respect to structural limitations, the federal courts were intentionally designed to be insulated from the influence of public opinion and from that of the other branches of government. Judges, as we have noted, are appointed by the President, and need to be confirmed by the Senate, a fact which, recent events have shown, is hardly devoid of significance.[59] But they are nonetheless appointed and not elected. Their appointment, moreover, is a lifetime one and the political considerations which may

57. Id. at 321-2.

58. This conclusion is apparent from the historical circumstances of the creation of the Constitution and from the textual language employed. It is made explicit in the Tenth Amendment. It should be noted, of course, that a generous judicial construction of the granted powers has resulted in something very like plenary legislative authority in the Congress. See Laurence Tribe, *American Constitutional Law* 316-17 (1988).

59. See, e.g., Symposium, supra n. 19.

have been apparent at the time of their nominations and confirmations, are notoriously poor indicators of their long term records on the bench. Once appointed, their compensation, by explicit constitutional rule, may not be reduced.[60] They may be removed from office by impeachment and conviction in the Congress and the use of this power is not unknown. But, as we have seen, it is an extraordinarily difficult process and is pretty much reserved for instances of personal impropriety, not for merely politically obnoxious uses of judicial power.[61] The judges are thus substantially relieved of that need to account for their official behavior which is assumed to be an essential element of the legitimacy of the decisions of other public officials. Indeed an apolitical, independent and impartial judiciary was understood to be indispensable to the proper functioning of the legal system.

More importantly for this discussion, the judiciary was understood not to be in need of the kind of structural constraints imposed on the other branches, because those represented limitations on the power to make policy choices, a function from which the judiciary were to be excluded. The courts were the mere executors of decisions, in the shape of legal rules, made by other political actors. Hamilton's remarks in *The Federalist* are again illustrative. The judiciary, he remarked, "may truly be said to have neither force nor will but merely judgment." Permanent judicial tenure was necessary, he noted, because, in a free government, the laws must be numerous, and the task of applying them commensurately laborious, requiring expertise and experience. Such detail in the legal material was necessary because

> to avoid an arbitrary discretion in the courts, it is indispensable that they be bound down by strict rules and precedents that serve to define and point out their duty in every particular case that comes before them.[62]

Hamilton was not referring primarily to constitutional adjudication, to be sure, and the sometimes sweeping breadth of the constitutional text must necessarily qualify the application of this dictum to the constitutional judge. But his injunction is strongly indicative of a traditional American hostility to discretion in adjudication,[63] an attitude highly relevant to the legitimacy of judicial review.

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60. Art. III §1.

61. In 1970, Gerald Ford, then a member of the House of Representatives, suggested an inquiry into the impeachment of William O. Douglas, then a justice of the United States Supreme Court. Ford's much reported contention that an "impeachable offense" is "whatever a majority of the House of Representatives considers [it] to be at a given moment in history" was widely and vigorously criticized. See Gerhardt, "The Constitutional Limits to Impeachment and the Alternatives," 68 *Tex. L. Rev.* 1, 82-83 (1989).

62. Id. at 471.

63. See Powell, supra n. 11, at 891-94.

The failure of these limitations may be of no great importance when we are dealing with sub-constitutional adjudication, where unacceptable judicial decisions may be overturned by a sufficiently persistent executive and legislature. As a practical matter, however, there are no reliable external remedies when the United States Supreme Court acts unconstitutionally in the course of constitutional adjudication.[64] Compliance with the norms of the Constitution must be the result of personal commitment by the judges themselves.

The legitimacy of judicial review thus appears to hinge on a broad social conviction that the constitutional judges act, in some sense, according to the Constitution. An extra-constitutional reliance on a mandate from the popular will has, for reasons noted, been carefully precluded. Skepticism about the foundations of that societal conviction, however, has made the issue a preoccupation of American constitutional lawyers and scholars. Since, as we have noted, the influence of the constitutional text on the decisions of that court is often far from obvious, how can we explain the fact that they are widely accepted as authoritative statements of supreme law? As will be observed below, few commentators have gone so far as to suggest that the Court should issue binding constitutional judgments while, at the same time, forthrightly eschewing any connection between those judgments and the Constitution. Rather, they have attempted to reconceive the notion of legal interpretation and thus reconstruct the relationship between the judge and the constitutional text.

D. Judicial Self-Restraint and "The Passive Virtues"

Before discussing theories of interpretation as potential restraints on judicial discretion, we should mention an argument offered in the early stages of the present debate which seeks such restraints in rules of jurisdiction and justiciability,[65] independent of any particular theory of interpretation. Alexander Bickel called these justiciability doctrines the "passive virtues",[66] and saw their exercise as the most appropriate way to recognize the fact that "judicial review is at least potentially a deviant institution in a democratic society".[67] His epithet for this problem was "the countermajoritarian difficulty."[68] In effect, the argument is for extensive invocation of reasons not to decide a case presenting a constitutional claim, viewing a judgment either way — sustaining or invalidating an act of one of the political branches — as a significant intervention into the democratic process.[69]

64. Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J. concurring).
65. See text at supra n. 12 ff. above.
66. Alexander Bickel, *The Least Dangerous Branch* ch. 4 (1962).
67. Id. at 128.
68. Id. at 16.
69. Id. at 129.

Bickel's first model for this approach was Justice Brandeis' concurring opinion in *Ashwander v. TVA*,[70] in which the majority held that Congress had constitutional power to create the controversial Tennessee Valley Authority, a vast government-owned hydroelectric power company challenged mainly by private companies with which it competed. Where the majority decided the issue on the merits in favor of the agency, Brandeis would have achieved the same result by denying jurisdiction on the ground that the plaintiffs — preferred shareholders of a private company seeking to invalidate a contract with the TVA — lacked standing to assert the constitutional claim. Bickel's second model was Justice Frankfurter,[71] a tireless advocate of staying the Court's hand by the invocation of grounds for not deciding: claimants lack standing, the parties' interests are not sufficiently adverse, the claim is not yet ripe for decision, it has become moot, the constitutional question is a "political" one suitable only for resolution by the elected branches, the statute in question can be narrowly construed so as to avoid the constitutional question, etc.

The point, in Bickel's view, is that the Court lacks the resources to make and implement social policy, and that its influence in implementing constitutional mandates depends on its capacity to persuade. Interpreting a phrase from Frankfurter, he said:

> What is meant . . . is that the Court should declare as law only such principles as will — in time, but in a rather immediate foreseeable future — gain general assent. . .. The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own; and — the short of it is — it labors under the obligation to succeed.[72]

The most obvious and powerful objection to this sort of argument is that it presupposes an institutional goal or set of goals for the accomplishment of which the Court's resources are to be husbanded, without providing clear guidance as to which;[73] it is, in short, open to equation with expediency and unprincipledness because it can be made to serve any principle.[74] Others have argued that many of the justiciability doctrines, by unduly restricting citizen-initiated chal-

70. 297 U.S. 288, 341 ff. (1936).

71. For his appraisal of Frankfurter see, e.g., Alexander Bickel, *The Supreme Court and the Idea of Progress* 29-39 (1970).

72. Alexander Bickel, supra n. 66, at 239.

73. For a more recent example which does define an institutional goal see Jesse Choper, *Judicial Review and the National Political Process* (1980). He reviewed the "record of judicial review" and "the record of noncompliance" with its mandates, and concluded that the Court has a limited "institutional capital" which it should expend only on the most essential functions of judicial review. Specifically, he concluded that its most essential role was the protection of human rights, and that much of the constitutional law relating to governmental structure — federalism and separation of powers — could be left to the political process by characterizing them as "political questions", thereby leaving the Court free to address human rights questions.

74. Bickel openly embraced the term in Bickel, supra n. 66, at 64-72, esp. 71:

lenges to government action which has only diffuse impact, are inconsistent with an essential role of the Court as articulator and implementor of constitutional values.[75] Further, it is objected that the public, whose ultimate acceptance of the Court's eventual decisions is the intended purpose of the strategic avoidance, probably doesn't understand the difference between abstaining and approving, more likely cares about results than about reasons, and prefers decisions to nondecisions.[76] Nonetheless these pragmatic considerations, frequently if unpredictably invoked by the Court, should be kept in mind as we examine theories of interpretation.

III. Sources of Interpretive Guidance and Their Claims to Legitimacy

It is impossible in this paper to do full justice to the enormous literature on constitutional interpretation in the U.S. even of the last 20-30 years. We attempt only a sampling of the principal lines of argument directed toward identifying appropriate limits on the scope of judicial construction. It seems most helpful to distinguish two levels of analysis of the problem: a typology of the sources in fact regularly invoked by the Court or individual justices for interpretive guidance, and a review of the principal contending theories for resolving conflicts in result suggested by different sources. Recent attempts to survey the types of sources reach similar though not identical lists; our organization draws on several.[77] It is understood that these arguments are types only, subject to variation in actual cases and most often used in combination as well as in conflict with each other.

> [The techniques for staying the Court's hand] allow leeway to expediency without abandoning principle. Therefore they make possible a principled government.

At least one critic, however, failed to see the connection: Gunther, "The Subtle Vices of the 'Passive Virtues' — A Comment on Principle and Expediency in Constitutional Law," 64 *Colum. L. Rev. 1* (1964).

75. See generally Bandes, "The Idea of a Case," 42 *Stan. L. Rev.* 227 (1990); Chayes, "Foreword: Public Law Litigation and the Burger Court," 96 *Harv. L. Rev.* 4 (1982).

76. For a survey of newspapers editors designed to test some of these hypotheses, which tended to confirm them, see Haltom & Silverstein, "The Scholarly Tradition Revisited: Alexander Bickel, Herbert Wechsler, and the Legitimacy of Judicial Review," 4 *Const. Comm.* 25 (1987).

77. See Philip Bobbitt, *Constitutional Fate* (1982), listing historical, textual, structural, doctrinal, prudential and ethical arguments; Fallon, "A Constructivist Coherence Theory of Constitutional Interpretation," 100 *Harv. L. Rev.* 1189 (1987), listing arguments from text, adopters' intent, constitutional theory (purposes underlying particular provisions or arrangements), precedent, and value; Michal Gerhardt & Thomas Rowe, *Constitutional Theory: Arguments and Perspectives* ch. 2 (1993), listing text, history, structural reasoning, value choices and moral reasoning, and precedent as sources of interpretive guidance.

A. Text

All would agree that the text is the starting point; a claim that the text alone is sufficient to answer important questions, without reference to other interpretive guides, is more controversial. Arguments purporting to draw inferences from the text alone take at least two forms, which present different problems of legitimacy: those which draw on the plain meaning of specific words and clauses, and those which seek to identify fundamental values from the text in its entirety against which the interpretation of specific clauses can be measured. In any event, such arguments claim their legitimacy from the premise that "only the text was adopted", that the only act known to have been shared by all those who voted for the constitution was approval of the particular words.[78]

1. Plain Meaning

Among the earliest examples of this kind of argument is *Chisholm v. Georgia*,[79] holding that the inclusion of the category "controversies . . . between a State and citizens of another State" in the judicial power (Art. III §2) meant that a state could be sued in federal court by a citizen of another state on a civil obligation. The Court reached this conclusion despite evidence that the framers did not intend to abrogate the common law rule that states cannot be sued in court without their consent. The majority purported to be applying the "ordinary rules for construction" and giving primacy to the text as the authoritative statement of the framers. While the specific holding was reversed by the 11th Amendment, the general interpretive approach was retained and elaborated by the Court in the Marshall era which shortly followed, especially in cases (the most prominent) involving the scope of federal powers.[80]

In this century textual literalism is typified by Justice Hugo Black's dissenting argument in *Konigsberg v. State Bar of California*[81], objecting to the majority's use of a "balancing test" under the First Amendment to weigh the interests of the government and that of a speaker whom the government seeks to suppress, to the speaker's ultimate disadvantage.[82] Similarly he argued against the application of the 4th Amendment's prohibition against unreasonable

78. For criticism of this argument see, e.g., Perry, "The Legitimacy of Particular Conceptions of Constitutional Interpretation," 77 *Va. L. Rev.* 669, 691-2 (1991).

79. Supra n. 30.

80. See Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819): plain meaning controls unless it produces manifest absurdity or injustice; Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 202 (1824): the "enlightened patriots" who framed and adopted the constitution "must be understood . . . to have intended what they said." See also Joseph Story, *Commentaries on the Constitution of the United States* 136 ff. (abridgement 1833, repr. 1987).

81. 366 U.S. 36, 61 ff. (1961).

82. See id. at 67-8:

searches and seizures to wiretapping, on the simple ground that wiretapping was a form of "eavesdropping" and thus was neither "searching" nor "seizing" as those terms are commonly understood.[83] Most emphatically, in the latter case, he argued against the Court's "rewriting" the text in order to adapt it to analogous problems of modern times.[84]

The notion of a "plain meaning" has a temporal ambiguity: if there is a difference, does a provision's "common sense" at the time of *adoption* control, or that of the time of its *application*? Justice Black seemed to suppose the latter, though in his "search and seizure" opinion[85] he argued that today's "commonly accepted usage" of the terms of the Fourth Amendment was consistent both with their meaning at the time of adoption and with the construction given them by the Court virtually throughout its history. Justice Story, in his 1833 treatise reflecting the interpretive approach of the Marshall Court, relegated "contemporary construction" — interpretations roughly contemporary to the adoption and therefore an important guide to original understanding — to a secondary status:

> It can never abrogate the text; it can never fritter away its obvious sense; it can never narrow down its limitations; it can never enlarge its natural boundaries.[86]

Two centuries of interpretation and debate, combined with modern sophistication about the meanings and uses of language and texts, have given rise to very broad skepticism about textual argument of the kind which purports to prefer plain meaning over extratextual aids to interpretation.[87] While a few participants in current debates insist that the text —because it does contain a considerable number of essentially unambiguous rules — provides much

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> The Founders of this Nation attempted to set up a limited government which left certain rights in the people — rights that could not be taken away without amendment of the basic charter of government. The majority's 'balancing test' tells us that this is not so. It tells us that no right to think, speak or publish exists in the people that cannot be taken away if the Government finds it sufficiently imperative or expedient to do so. Thus, the 'balancing test' turns our 'Government of the people, by the people and for the people' into a government over the people.

Justice Black elaborated on his literalist argument both in the media and in an article, Black, "The Bill of Rights," 35 *N.Y.U. L. Rev.* 865 (1960). For extended excerpts from a news interview, see Bobbitt, supra n. 77, at pp. 31-36.

83. Katz v. United States, 389 U.S. 347, 364 ff. (1966).

84. See also Justice Scalia's dissent in Maryland v. Craig, 497 U.S. 836, 860 ff. (1990), arguing that the confrontation clause of the 6th Amendment could not be read, as the majority had, to allow for an exception in the case of a victim accusing an adult of child abuse; the clause "plainly says all that need be said" on the subject and there is no room for further balancing of interests.

85. Supra n. 83.

86. Supra n. 80, at 137.

87. For one of many attempts to bring multidisciplinary insights (including "hermeneutics") to bear on the theory of constitutional interpretation, see "Interpretation Symposium," 58 *So. Cal. L. Rev.* 1-725 (1985).

more guidance and restraint in the interpretive process than the more extreme skeptics acknowledge,[88] they have been more concerned to counter other specialized theories of interpretation than to defend textualism in its more restricted forms.[89]

2. Textualist "Interpretivism"

A "common-sense" reading of the text, if limited only by the grammatically plausible, can be broad as well as narrow, imaginative as well as literalist. It has been asserted that, as a practical matter, no theory of interpretation which does not purport to limit the courts to principles communicated *at least indirectly* by the constitutional text can be made plausibly consistent with "modern American political-legal culture" so as to become a serious competitor among theories;[90] but this assertion did not imply serious constraint. Even those for whom textual terms like "liberty" or "equal protection of the laws" are not sufficiently broad, and who argue for the appropriateness of judicial enforcement of unenumerated rights, have been able at least in recent decades to invoke the 9th Amendment[91] and the Privileges and Immunities Clause of the Fourteenth Amendment[92] — despite

88. See Laycock, "Taking Constitutions Seriously: A Theory of the Judicial Review," 59 *Tex. L. Rev.* 343 (1981); Schauer, "Easy Cases," 58 *So. Cal. L. Rev.* 399 (1985); Id., "Formalism," 97 *Yale L. Rev.* 509 (1988); Id., "Constitutional Positivism," 25 *Conn. L. Rev.* 797 (1993).

89. Thus Schauer, for example, concerns himself with positivism as a device for defining law independently of moral content, and is willing to include in the definition of law precedent and "perhaps other authoritative materials" such as original intent, authoritative treatises, privileged historical works, practices of certain bodies, etc.: 25 *Conn. L. Rev.* at 824-5. Laycock too argued only for the text as first source of guidance, and complained of overuse of constitutional legislative history: 59 *Tex. L. Rev.* at 360.

90. Perry, supra n. 78, at 688f.

91. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

92. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;. . .

judicial neglect[93] and dismissal[94] respectively as warrants for such consideration.[95]

A prominent example of this potential is the work of John Ely,[96] who insisted on the "interpretivist" position that judicial review should be limited to "norms that are stated or clearly implicit in the written Constitution".[97] He sought, from a reading of the text as a whole, fundamental values on the basis of which to interpret of the more open-ended clauses. After rejecting a number of proposed values as either inconsistent with the democratic principle or too indeterminate for general use,[98] he found a "nature of the United States constitution", namely that of "constituting" a "process of government" rather than a "governing ideology".[99] Ely also found a concern for "policing the process of representation" to be the "deep structure" of the most important decisions of the Warren Court,[100] after identifying the Burger Court's abortion decision[101] as the "clearest example of noninterpretivist [and therefore illegitimate] 'reasoning' on the part of the Court in four decades."[102]

Among the clearest judicial examples of the kind of reasoning on which Ely relied, ironically enough, was Justice Douglas' majority

93. The Court itself has yet to decide a case in which a majority relied directly on the 9th; but since Justice Goldberg's concurring opinion in Griswold v. Connecticut, 381 U.S. 479, 486 ff. (1965) it has had increased respectability as a warrant for consideration of the possibility of unenumerated rights. On the history and theory of the 9th Amendment see Symposium, "On Interpreting the Ninth Amendment," 64 *Chi.-Kent L. Rev.* 37-268 (1988); Randy E. Barnett (ed.), *The Rights Retained to the People: The History and Meaning of the Ninth Amendment* (1989). Historical rebuttal to a reading of the provision as recognizing specific unenumerated rights is presented in McAfee, "The Original Meaning of the Ninth Amendment," 90 *Colum. L. Rev.* 1215 (1990).

94. See The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36, 79-81 (1873), holding that the protection of this clause was limited to a short list of rights relating to the national government. Since this decision the clause has not been a significant factor in the Court's work, see John Nowak & Ronald Rotunda, *Constitutional Law* 336 (4th ed. 1991). For critical analysis of the majority's interpretation, and support for the dissent in a review of the adoption history, see Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* ch. 3 (1977).

95. See, e.g., John Ely, *Democracy and Distrust* 22-32 (14th Amendment privileges and immunities) and 33-40 (9th Amendment) (1980); Laurence Tribe & Michael C. Dorf, *On Reading the Constitution* 52-6 (1991).

96. Ely, supra n. 95.

97. Ely, supra n. 95 at 1. That he relies on the text as such seen, for example, in his reference to the inconclusive legislative history of the 14th Amendment:

> It really shouldn't be critical, however. What is most important here, as it has to be everywhere, is the actual language of the provision that is proposed and ratified.

Id. p. 27.

98. The judges' own values, natural law, neutral principles, reason, tradition, consensus, and progress are all dismissed with relatively brief treatment, id. at 43-72.

99. Id. ch. 4, esp. p. 101.

100. Id. at 73 ff.

101. Roe v. Wade, 410 U.S. 113 (1973).

102. Note 95 above at 2.

opinion in *Griswold v. Connecticut*,[103] the principal progenitor of the abortion decision. Douglas found a right of privacy implicit in a number of specific provisions of the Bill of Rights (the freedom of association held to be a corollary to the freedom of speech guaranteed in the First Amendment, the freedom from involuntary billeting of soldiers in one's house in peacetime expressed in the Third, the freedom from unreasonable searches and seizures in the Fourth, the freedom from self-incrimination in the Fifth), found this generalization supported by a number of prior decisions of the Court, and applied it to invalidate a state statute prohibiting the use of contraceptives by married persons. While the opinion has been ridiculed for its unfortunate use of the metaphor of "penumbras, formed by emanations from these guarantees which help give them life and substance",[104] it represents the same form of generalization of broad principle from specific textual provisions as that undertaken by Ely.

Almost every aspect of Ely's theory has been criticized,[105] especially the discounting of other procedural and substantive values in the text[106] and the use of his "representation-reinforcing" value to support a broad reading of the text inconsistent with the original intention of the framers.[107] Though his work has stimulated much discussion and debate, he himself admits that it has not had many adherents.[108] For our purposes it illustrates the difficulty and extreme controvertability of interpretive methods depending on inferences from "text alone".

B. Original Intent

1. In general

Where the text does not provide a clear answer, a natural next step is to inquire into the meaning given to it by the people who adopted it. Reliance on the intent of the constitution-makers as an interpretive guide has a long history going back at least to the Mar-

103. Supra n. 93.
104. 381 U.S. at 484.
105. Symposia concentrating on Ely's work are found, for example, in 42 *Ohio St. L. J.* #1 (1981) (including discussions of Jesse Choper, *Judicial Review and the National Political Process* (1980)); 77 *Va. L. Rev.* (1991).
106. See, e.g., Laycock, "Taking Constitutions Seriously: A Theory of Judicial Review," 59 *Tex. L. Rev.* 343, 361 ff. (1981), finding the procedural value of federalism (national unity and state sovereignty in tension), as well as many substantive values equally immanent in the text; Maltz, "Federalism and the Fourteenth Amendment: A Comment on *Democracy and Distrust*," 42 *Ohio St. L. J.* 209 (1981), noting neglect of the value of local autonomy. On the inadequacy of purely procedural values see, e.g., Tribe, "The Puzzling Persistence of Process-Based Constitutional Theories," 89 *Yale L. J.* 1063 (1980); Brest, "The Substance of Process," 42 *Ohio St. L. Rev.* 131 (1981).
107. See, e.g., Berger, "Ely's 'Theory of Judicial Review'," 42 *Ohio St. L. J.* 87 (1981).
108. See Ely, supra n. 18, at 854 n.57.

shall period, and can be regarded as a staple of constitutional law.[109] Recently, however, debate has centered on stronger forms of the argument, giving controlling weight to that intent over other sources and often emphasizing the *subjective* intentions of the particular persons involved in the constitution-making process. Arguments of this character, as well as opposition to them, can be found as early as debates in Congress in 1791 over its power to create a national bank.[110]

An exemplary judicial use of the argument is *Hans v. Louisiana*,[111] where the Court held that the states enjoyed sovereign immunity from the jurisdiction of the federal courts in suits brought by their own citizens. The case was one in which a bondholder sued the state to recover under a bond which the state had repudiated, claiming that the repudiation violated the federal constitution's prohibition against state laws impairing the obligation of contract. Plaintiff argued that it was a case "arising under the Constitution", and that both the Constitution (Art. III §2 cl. 1) and federal statute provided for jurisdiction in such cases without any qualification as to the identity of the parties. The Court's argument was based on the adoption history of the 11th Amendment,[112] which concededly did not apply to the case according to its literal terms because it addressed only suits against a state by citizens of another state. The argument may be summarized as follows: the 11th Amendment was adopted specifically to overrule the Court's decision in *Chisholm v. Georgia*;[113] this meant that the framers and ratifiers of that Amendment were in agreement with the dissent in *Chisholm*, which had argued that the constitutional language must be presumed to incorporate the doctrine of immunity; the adoption history of the original constitution — the *Federalist* #81 and the debates in the ratifying conventions, in-

109. See, e.g., Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 351 ff. (1816), invoking "historical facts" to confirm a primarily textual argument, concerning the ratification debates and the understanding of the first Congress of 1789 which had many members who had participated in the constitution-making process. See also Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 721 ff. (1838), citing the text and the intention of the framers at the convention as primary sources, and proceeding to sustain the Court's original jurisdiction over a boundary dispute between two states, against an argument that boundary disputes were excepted from such jurisdiction, on the ground that such disputes were among the most prominent cases of a civil nature between states at the time of adoption and must therefore have been contemplated by the framers.

110. See the documents excerpted in Jefferson Powell, *Languages of Power* 37-50 (1991). A similar debate occurred in 1796 over the extent to which the House of Representatives was entitled to participate in treaty making: see Powell, supra n. 11, at 917 ff., who downplays the evidence of commitment to original intent as a controlling source; Lofgren, "The Original Understanding of Original Intent?," 5 *Const. Comm.* 77, 94-102 (1988), who finds clear analogs of modern intentionalism.

111. 134 U.S. 1 (1890).

112. The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

113. Supra n. 30, discussed further in text at n. 79.

cluding arguments by the future Chief Justice Marshall in the Virginia convention, all addressed to opponents' complaints about the implications of that textual language — clearly showed an understanding that individual citizens of other states would not be able to hale a state before the federal courts without its consent; the case of a citizen suing his own state is not distinguishable in principle from the one debated; therefore the literal language of the text is to be read as incorporating the general exception of state sovereign immunity.[114]

2. "Originalism"[115]

In political and scholarly debate, the strong historical argument has been pressed with increasing sophistication since the controversial decisions of the Warren Court. Among the leading statements was one by Robert Bork, writing in 1971 as a professor of law.[116] In terms similar to those discussed above, he asserted that the American constitutional tradition was inconsistent with the making of value choices by the courts, as institutions not legitimated by popular election; rather they were to apply value choices made by elected legislators or by the Constitution itself. Measured by that standard, the entire line of "substantive due process" decisions of the Court — exemplified by *Griswold v. Connecticut*,[117] but going back to the beginning of the century when economic interests were protected by this theory[118] — is illegitimate, since none articulates a persuasive theory based on the constitutional language whereby a minority's preference is to be protected against that of the majority embodied in legislative enactment in the particular spheres involved. For Bork, the legisla-

114. For present-day examples see Marsh v. Chambers, 463 U.S. 783 (1983), holding that the Court's own interpretive analysis of the Establishment Clause of the First Amendment did not apply to the employment of a Christian chaplain by a state legislature, in view of an unbroken and unchallenged history of the practice dating back to the very Congress which proposed the Amendment; Bowers v. Hardwick, 478 U.S. 186 (1986), rejecting the claim that prosecution for homosexual sodomy violates the right of privacy on the basis of virtually universal criminalization of the conduct from long before adoption to very recent times.

115. The term was used in Brest, "The Misconceived Quest for the Original Understanding," 60 *B.U. L. Rev.* 204, 204 n.1 (1980), as equivalent to "interpretivism", covering both textual and historical claims, "as distinguished, for example, from the interpretation of precedents and social values". He then distinguished three forms of "originalism": textualism, intentionalism, and structuralism. We find it helpful to use the term more narrowly, primarily for what he calls "intentionalism".

116. Bork, supra n. 34.

117. 381 U.S. 479 (1965), holding it a violation of a constitutional right of "privacy" for the state to prohibit the use of contraceptives.

118. The leading case was Lochner v. New York, 198 U.S. 45 (1905), holding that a "freedom to contract" was infringed by regulation of employees' hours and working conditions. The abandonment of special substantive due process for economic rights, as unsupported by the text, was announced in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

tive will could be overridden only by the superior will of the constitution-makers. Insisting that this did not mean applying constitutional limitations only to situations which the framers had foreseen, and that judges were obligated not to give "crabbed" readings to individual freedoms specified in the text or deny them their "full, fair, and reasonable meaning", but that overgeneralizations such as Justice Douglas' in *Griswold* were equally inappropriate, Bork later used the following example: if an examination of the evidence of framer understanding of the equal protection clause of the 14th Amendment showed that both equal treatment for blacks and a general concern for racial equality were expressed, but there was no indication that the adopters thought of equality in terms of sexual orientation, there would be no warrant for applying the clause to inequality premised on the latter trait.[119] Similarly, he objected to the application of the equal protection clause, a "specified individual right", to state voting rights cases, which involve participation in governmental processes, because the substantive equality principle in that setting was contrary both to the text and to the adoption history of the 14th Amendment, as well as to political practice from colonial times to the present.[120]

Originalism equates the Constitution with the will of its creators, so that the interpretation of the text which the original enactors had in mind must prevail over other meanings, however "plain" the latter may be to the present interpreter. Its principal rationale is that legitimacy derives from authority. The text must be understood in law as an expression of some person or persons having authority to adopt it, an "author"; it is the intention of that author which binds the judge whose job it is to apply the text to a specific dispute.[121] Only in this way can the judge rely on the legitimacy of the constitution-making act.

Some of the objections to this position are more or less technical. They deny that it is possible for courts to ascertain the historically intended meaning of a provision of the text, because the evidence is too remote and because the relevant intentions are divided among too many people to allow the distillation of one authoritative intention. One of the authors of this report has attempted to respond to this criticism.[122] *First*, the task is not to determine *precisely* how the originators would decide a particular case, but to determine which of two proffered interpretations in a particular case is *most likely* to coincide

119. Bork, "The Constitution, Original Intent, and Economic Rights," 23 *San Diego L. Rev.* 823, 827-8 (1986).

120. 47 *Ind. L. J.* at 18 f.

121. See Kay, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses," 82 *N.W.U. L. Rev.* 226, 230 (1988); Smith, "Law Without Mind," 88 *Mich. L. Rev.* 104, 112 (1989).

122. Kay, supra n. 121, at 236-57.

with their understanding of the scope of the relevant rule. *Second*, the relevant intentions are those of the ratifiers, those who formally decided whether the document proposed by the Philadelphia Convention would be put into effect; among them, the shared intentions of the members of the majorities which effected ratification would control. Though they held different intentions, normally one can begin with a central paradigm conveyed by the language.[123] It would extend to less obvious meanings only on the basis of affirmative evidence of such intention; and in the highly unlikely event that one could show that two conflicting views were held by the supporters without a majority for either, neither could be treated as authoritative and the text would be judicially inapplicable. *Third*, in the unusual case of an inability to establish that any particular interpretation was more likely supported by the relevant adopters than another, the Constitution provides some clear "back-up rules" to resolve such "ties". For example, the federal government (or any one of its branches) has only those powers granted to it by the constitution and therefore loses such a "tie" where its power is at issue. Conversely, since states have all governmental powers not denied them by the constitution, they win such a "tie" where their powers are at issue.

Objections to this view have taken various forms.[124] One is the above-mentioned difficulty in ascertaining the shared views of persons who acted in large groups over 200 years ago, including, of course, that of shedding one's own culturally determined biases and conceptual frameworks in order to put oneself in their intellectual shoes;[125] Justice Scalia, a professed originalist, has emphasized the intricacy and laboriousness of the task of proper historical inquiry — of which there are few examples in Supreme Court opinions — while preferring the good faith effort at such inquiry over its abandonment in despair.[126] Another is the claim — vigorously contested as a matter of historical fact — that the framers and ratifiers, at least, did not expect that their own specific *understandings* of how the text would be applied should necessarily control, and that therefore true adherence to their *intent* would leave room for adaptation to new circumstances with which they might individually disagree.[127] Moreover,

123. It is clear that if this is done on the basis of common meanings rather than ones expressed by members of the relevant group, they must be held as of the time of ratification.

124. One of the more comprehensive recitals remains Brest, supra n. 115.

125. See the extended caveats associated with the kind of historical inquiry which appears to be required by originalism in Powell, "Rules For Originalists," 73 *Va. L. Rev.* 659 (1987).

126. Scalia, "Originalism: The Lesser Evil," 57 *U. Cin. L. Rev.* 849, 856 f. (1989).

127. For different readings of the evidence see, e.g., Powell, supra n. 11, and Sherry, "The Founders' Unwritten Constitution," 54 *U. Chi. L. Rev.* 1127 (1987) (finding an understanding that interpreters would not be bound by subjective intent con-

once the originalist concedes, as some like Judge Bork have done,[128] that it is the task of the judge to make the framers' value choices relevant to today's problems, so that an appropriate level of generalization must be identified,[129] the theory is opened up to the same charge of indeterminacy which is made against competing theories.

Perhaps the most fundamental objection voiced against originalism is that firm adherence to it will produce unacceptable results. This objection necessarily denies the claim that the courts' legitimacy in overturning majoritarian acts is derived solely from the authority of the adopters. These objectors insist, rather, that the people who must *now* live under the Constitution cannot be bound in this fashion by the intentions and limited imaginations of a remote generation.[130] Justice Scalia, for example, concedes that there are a few likely results of originalist interpretation which he would not expect to follow as a judge, such as that public flogging is not "cruel and unusual punishment" within the meaning of the 8th Amendment.[131] Justice Brennan, in particular, saw the role of the Court in exercising judicial review as one of responding to "different historical practices"[132] in each succeeding generation; for this task, he says, the judge must always ask what the words mean "in our time".[133] Opponents of originalism also emphasize the democratic weakness, from the perspective of the present day, of the electoral process in the adoption period: a decision reached by white male owners of real estate in 1789 may have less claim on today's loyalty than would one reached by a broader-based electorate.[134]

Ultimately these differences represent a basic disagreement on the proper design and structure of a legal system.[135] The chief policy argument for originalism is certainty and predictability, that it provides an anchor for interpretation in a specific time and place and therefore minimizes the effects of changes in values over time. Some originalists like Bork and Scalia, however, have conceded that original intent is subject to judicial modification in favor of a level of generalization sufficiently high to allow for adaptation to current

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cerning specific clauses); Lofgren, supra n. 110, and Kay, supra n. 121 (unpersuaded that the original understanding was inconsistent with modern originalism).

128. Text at supra nn. 119 f.

129. See also "*Monaghan*, Stare Decisis and Constitutional Adjudication," 88 *Col. L. Rev.* 723, 726 (1988): "The level at which the original understanding is generalized is decisive in any theory of originalism."

130. Among the most prominent adherents to this view was former Justice Brennan: see, e.g., his speech entitled "The Constitution of the United States: Contemporary Ratification," reprinted in Jack Rakove (ed.), *Interpreting the Constitution: The Debate Over Original Intent* 23-34 (1990). See also Brest, supra n. 115, at 208 f.

131. Scalia, supra n. 126, at 861.

132. Supra n. 130, at 27.

133. Id. See also Michael Perry, *Morality Politics and Law* 126 f. (1988).

134. Brest, supra n. 115, at 230.

135. See Kay, supra n. 121 above, at 285.

circumstances, or in favor of particularly strong present-day moral objection to specific original understandings, or even in favor of the stability provided by a settled course of judicial decision.[136] For such theorists a question has been raised whether their view — in a form likely to be actually employed — presents a satisfactory answer to the problem of interpretation.[137] Certainly it is widely agreed that much of the product of modern constitutional adjudication cannot be reconciled with ordinary views of the original understanding. Nevertheless, without some form of submission to original intentions, in light of the difficulties with pure textualism discussed above, legitimation of constitutional adjudication by reference to the constitutional text becomes problematic.

C. Precedent

The difficulty of discerning socially and politically acceptable rules to govern constitutional adjudication over time, while also maintaining a firm connection to the constitutional text, might be alleviated by reference to the document as mediated by a developing body of judicial precedents interpreting it. In the common-law system private law and criminal law was largely developed by the courts in individual cases relying on prior judicial decisions and opinions as authority. Consequently, precedent — practice of the government agencies responsible for implementing the constitution — came as naturally to the founders as any legal source, even though it is nowhere mentioned in the text. An early judicial example is *Stuart v. Laird*,[138] in which the Court sustained the congressional practice (since abandoned) of requiring Supreme Court justices to sit on circuit courts, against the claim that it violated implicit limitations on the jurisdiction of the Court itself. The Court said:

> . . .(P)ractice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. The practical exposition is too strong and obstinate to be shaken or controlled. . .."[139]

As interpretive decisions have accumulated and the adoption of the text has receded in history, the overwhelmingly predominant source

136. See Monaghan, supra n. 129, at 739 ff.; Scalia, supra n. 126, at 861 ("(A)lmost every originalist would adulterate it with the doctrine of stare decisis. . .").

137. Solum, "Originalism as Transformative Politics," 63 *Tul. L. Rev.* 1599 (1989).

138. 5 U.S. (1 Cranch) 299 (1803).

139. 5 U.S. at 299. James Madison also believed that practice can settle an issue of interpretation, see Powell, supra n. 11, at 939-41; Drew McCoy, *The Last of the Fathers: James Madison and the Republican Legacy* 79-82 (1989).

of authority for the Supreme Court's interpretation of the constitution has indeed become its own previous opinions.[140]

The primary arguments in favor of relying on judicial precedent are institutional economy, fairness and predictability toward those who must conform their future conduct to constitutional requirements, increased motivation to give full consideration to each decision because of its broader impact, improved protection against political influence.[141] Because the prior cases involve specific fact situations and the opinions are rendered with the benefit of focused advocacy on all sides, they may afford better guidance, both for the Court and for persons subject to the rules stated in them, than the framers' articulation of general principles; analogical reasoning remains the most familiar and comfortable method for judges in a common-law tradition.[142] Thus it is argued that proper respect for prior decisions is an important element in that judicial restraint which helps support the legitimacy of the Court's work.[143] It has frequently been characterized as an important element of the "rule of law".[144] On the other hand it is often recognized that it is more difficult for the people to overrule an incorrect (or unacceptable) decision on a constitutional question (the amendment process is the only direct method), than it is with decisions applying ordinary law (which can be overridden by legislation), and that therefore the Court should be more open to correcting its own mistakes.[145]

The result of weighing these policy considerations, at least in very recent times, has been a pragmatic treatment of precedent. Its disharmony with the ideal of the judge who finds law but doesn't make it, is exemplified by decisions on when and how to overrule a prior case. These decisions purport to be based on a balance between the degree of reliance disputing actors may have placed on the prior law and the strength of the policy underlying the new interpretation.[146] Especially telling are decisions in which the Court promul-

140. This statement can be verified by a quick perusal of any opinion of the Court picked at random from the last 50 years.

141. See Monaghan, supra n. 129, at p. 744.

142. Monaghan, supra n. 129, at 758 f.

143. See, e.g., Mapp v. Ohio, 367 U.S. 643, 674 (1961 (Harlan, J., dissenting).

144. See, e.g., Planned Parenthood v. Casey, 112 S.Ct. 2791, 2808 (1992) (O'Connor, J.).

145. See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 408 (1932 (Brandeis, J., dissenting); cf. Monaghan, supra n. 129, at 762 f.

146. On overruling, the Court struck the balance in favor of a new interpretation in a criminal evidence case, Payne v. Tennessee, 111 S.Ct. 2597 (1991), but in favor of reliance in the latest abortion case, Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992). The leading case on prospective overruling is Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); it is now held that selective retroactivity based on case-by-case evaluation of reliance is inconsistent with the requirement of equal treatment, see Harper v. Virginia Department of Taxation, 113 S.Ct. 2510 (1993); James B. Beam Distilling Co. v. Georgia, 111 S.Ct. 2439 (1991); Griffith v. Kentucky, 479 U.S. 314 (1987).

gates a new interpretation, which it expressly holds applicable only to situations arising in the future. In one such prospective overruling case, Justice Scalia expressed the restraintist objection to this approach:

> I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it — discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.[147]

In terms of a legitimacy tied to the Constitution, of course, each intervening layer of judicial elaboration attenuates that critical connection. At some point, it may be essential to remember that, as Justice Frankfurter said, "[t]he ultimate touchstone of constitutionality is the constitution itself and not what we have said about it."[148]

D. Structural Argument[149] *and "Functionalism"*

A further recognized method of interpretation, whereby courts are able to adapt the Constitution to what they perceive to be modern exigencies, is to seek guidance not from specific clauses but from the structure of government created by the document as a whole. The primary domain of structural argument, of course, is in the areas of federalism and separation of powers, both principles which are staples of constitutional law but which are found in the text only by implication. This approach can be traced back at least as far as Chief Justice Marshall's opinion in *McCulloch v. Maryland*,[150] articulating the expansive view of the scope of the specific powers granted in the Constitution to the national government. This determination was defended as implied in the document as a whole insofar as it created a central government with broad purposes and functions.[151]

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147. Scalia, J., in James B. Beam, 111 S.Ct. at 2450 (emphasis in original). See also his concurrence in Harper, 113 S.Ct. at 2522: "Prospective decisionmaking is the handmaid of judicial activism, and the born enemy of stare decisis."

148. Graves v. O'Keefe, 306 U.S. 466, 491-92 (1938) (concurring opinion).

149. Credit for the label and for the modern articulation is given to Charles Black, *Structure and Relationship in Constitutional Law* (1969); see Bobbitt, supra n. 77, ch. 6; Gerhardt & Rowe, supra n. 77, at 130f.

150. 17 U.S. (4 Wheat.) 316 (1819).

151. See also Joseph Story, *Commentaries on the Constitution of the United States* §183 at p. 136 (abridgement 1833, repr. 1987):

> In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, *as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts*. Where its words are plain, clear, and determinate, they require no interpretation; and it should, therefore, be admitted, if at all, with great caution, and only from necessity, either to escape some absurd consequence, or to guard against some fatal evil. (emphasis added)

The modern significance of this approach has been seen, for example, in recent decisions involving federal-state[152] and legislative-executive[153] relationships respectively. The federalism cases first established and then abandoned a "state sovereignty" exception to the power of the federal government to regulate interstate commerce, which precluded application of such regulations to economic activities of state and local governments when that would adversely affect the ability of the states to perform their sovereign functions. Justice Blackmun concurred in the first decision and wrote the majority opinion in the last, but was the only one agreeing with both; he found in the last case that the first decision's attempt at formulating standards for applying the state immunity had proved in intervening decisions to be unworkable and that no further effort could succeed. Therefore, the state sovereignty exception had to be abandoned in favor of reliance on the political process for protection of the states. The argument in favor of the exception, though it cited a specific provision as a limitation on the granted power,[154] has been more properly seen as an implicit structural argument generalizing from numerous provisions presupposing vital state governments.[155] The argument against it reflects discomfort with overly interventionist judicial review[156] but is criticized as neglect of an essential judicial role in the preservation of constitutionally recognized institutions.[157]

In the separation of powers cases two firm rules have been drawn from the general distribution of authority in the Constitution: (i) that Congress may take binding action toward persons and institutions external to itself only through formal legislation, and (ii) that Congress may not assign executive functions to itself or its agents.

152. National League of Cities v. Usery, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). Usery had itself overruled a decision less than ten years old, Maryland v. Wirtz, 392 U.S. 183 (1968).

153. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), invalidating the so-called "legislative veto", a type of statutory provision giving one or both Houses of Congress power to disapprove of particular executive or administrative decisions authorized by the statute, without such disapproval itself following the procedure for enacting new legislation; Bowsher v. Synar, 478 U.S. 714 (1986), invalidating a statute giving an officer answerable directly to the congress a participatory role in executing the rather complex statutory scheme for budgetary control; Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 111 S.Ct. 2298 (1991), invalidating the delegation of veto power over decisions of an administrative agency to a "review board" consisting of Congressmen appointed on the basis of their legislative committee assignments.

154. The 10th Amendment, reserving to the states and to the people all powers not granted by the constitution to the federal government.

155. Bobbitt, supra n. 77, at 74-5.

156. Field, "The Supreme Court, 1984 Term — *Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine," 99 *Harv. L. Rev.* 84, esp. 89 f. (1985), likening National League of Cities to Lochner v. New York, 198 U.S. 45 (1905), the case which launched economic substantive due process.

157. Van Alstyne, "The Second Death of Federalism," 83 *Mich. L. Rev.* 1709 (1985).

The most dramatic example is the so-called "legislative veto" case,[158] in which a statutory device of long standing and wide use,[159] designed to enable Congress to take advantage of administrative expertise in specialized subject-matters while exercising a more effective oversight over the agencies' discretion, was struck down because the "veto" itself,[160] as distinguished from the statute authorizing it, by definition did not follow the constitutional procedures for enacting legislation.[161] In each of these cases a structuralist or "functionalist" argument[162] would take the current working relationships among the constitutional institutions into account in interpreting the specific rules set forth in the document,[163] whereas a "formalist" approach leads to more rigid application of the rules at the expense of disturbing those relationships; in each, formalism appears to have won out.

The chief advantage of structural argument is that it allows consideration of the practical effect of applying specific limiting rules on the normal functioning of governmental institutions in light of the overall scheme of government envisioned by the Constitution.[164] Its chief difficulty from the perspective of legitimacy, illustrated by the above examples, is indeterminacy: how is one to determine, without arbitrary discretion, when the practical functioning of an institution in the present environment requires a flexible reading of explicit textual provisions?[165] Such pliability necessarily obscures the connection between the decision and the document as its legitimating source.

E. Argument from Extratextual Values

The most controversial sources of guidance for interpretation of the more open-ended provisions of the Constitution, of course, are those which are not fairly attributable either to the text, or to an understanding articulated in the founding period, or to an established line of precedent. The Court has been willing, from time to time, to rely explicitly on extratextual "fundamental values," though it is frequently noted that such bases of decision are most often either unac-

158. Chadha, supra n. 153.

159. It had been first proposed by President Hoover over 50 years earlier, and was incorporated in more than 200 statutes still in force at the time of the decision, see 462 U.S. at 968 (White, J., dissenting).

160. Usually a resolution adopted by one or both houses of Congress or by one or committees thereof, approving or disapproving of agency action.

161. Art. I § 7: approval by vote of each house and presentment to the President for approval or veto.

162. See Strauss, "Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?," 72 *Cornell L. Rev.* 488 (1987).

163. Justice White's dissent in Chadha, 462 U.S. at 978 ff., is an excellent example.

164. See Bobbitt, supra n. 77, at p. 85.

165. See, e.g., Blasi, "Creativity and Legitimacy in Constitutional Law," 80 *Yale L. J.* 176 (1970).

knowledged or accompanied by other more traditional arguments.[166] The clauses invoked in connection with such values are most often the due process clauses of the 5th and 14th Amendments, prohibiting federal and state governments from depriving persons of life, liberty or property "without due process of law". It is common to such arguments that they assume an evolving Constitution whose democratic legitimacy is derived from something other than — or more precisely in addition to — the formal ratification of the text by the prescribed supermajorities. Rather, they assume a widely shared commitment proven in other ways. Moreover, it is rarely claimed that extratextual values should take precedence over other sources when these provide a clear answer; rather it is sought to show that the Court has often invoked them, and to articulate a conception of judicial review which accommodates such a practice with the "countermajoritarian difficulty."

1. History and Tradition

Judicial debate over the permissibility of resort to extratextual values is found at least as early as *Calder v. Bull*,[167] in which Justice Chase and Justice Iredell exchanged *obiter dicta* for and against invalidation of state laws on natural law grounds. The justices have been more comfortable over the years, however, with a variant of the argument from history. A favorite modern example is *Moore v. City of East Cleveland*,[168] which invalidated a city ordinance restricting "single-family" residence zones to a nuclear family and excluding, in the particular case, a grandmother living with her two grandsons who were not brothers but cousins. Justice Powell, speaking for a four-vote plurality, said:

> Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.[169]

He relied for his standard principally on the dissenting opinion of Justice Harlan — a conservative devotee of the passive virtues this time dissenting from a decision to avoid — arguing in an early contraceptives case[170] that a prohibition against the use of contracep-

166. See, for example, the analysis of the Cherokee Cases, especially Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), in Bobbitt, supra n. 77, at 116 ff., in which state laws purporting to dissolve and outlaw the Cherokee nation are invalidated on the basis of treaties between the federal government and the Cherokees — but not by reason of conflict with specific provisions of treaties so much as with the status of federal protectorate represented by the treaties.

167. 3 U.S. (3 Dall.) 398 (1798).

168. 431 U.S. 534 (1977).

169. 431 U.S. at 503.

170. Poe v. Ullman, 367 U.S. 497 (1961).

tives by married persons is an intolerable invasion of privacy. Harlan, in turn, had invoked precedents going back to *Calder* purporting to interpret various clauses of the Constitution, but especially the term "liberty" in the due process clauses, as protecting those fundamental rights which "belong to the citizens of all free governments" against "substantial arbitrary impositions and purposeless restraints." In speaking of those cases as seeking a balance between individual liberty and the demands of organized society, Harlan said:

> [The] balance [is] struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[171]

Harlan, at least, saw restraint in that concept of tradition,[172] and Powell relied on it to distinguish a case prior to *Moore* which had sustained an ordinance which had drawn the single-family line at blood or marital relationship.[173]

A principal objection to this variant is the familiar one of indeterminacy, leaving room for the justices' personal preferences to take actual control: what counts as a tradition, and how is it to be proven?

2. "Prophecy", "Contemporary Ratification" and "Constitutional Moments"

A number of theorists go beyond tradition to a more self-conscious judicial role in identifying and developing fundamental values. The most prominent judicial spokesman for this view in recent times was Justice Brennan, who insisted that the Court seeks to speak for its own community and generation in performing the task of interpretation which is public, obligatory and burdened with practical consequence; he spoke of "contemporary ratification" of the Constitution as interpreted.[174] Indeed he argued that an adaptive interpretation is essential to the Constitution's continued vitality, given the difficulty of formal amendment.

Alexander Bickel[175] saw the passive virtues as essential to a "prophetic" role for the Court, an educational role which can only be

171. 367 U.S. at 542.

172. When a majority of the Court finally was willing to address the issue in Griswold v. Connecticut, supra n. 93, Harlan's concurring opinion chided Douglas' majority opinion for failing to restrict its rationale to traditional values.

173. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

174. Note 130 above, esp. pp. 27 ff. See also Holmes, J., in Missouri v. Holland, 262 U.S. 416, 433 ff. (1920).

175. Supra n. 66, at 239.

performed by an agency with their "insulation and the marvelous mystery of time";[176] Michael Perry expanded that concept to one of judicial review as "the institutionalization of prophecy," in which the Court calls the government to "provisional judgment" as representatives of the people.[177] A "dialectical"[178] relationship exists between judiciary and elected officials, in Perry's view, in which the various controls which the latter have over the former are at least cumulatively sufficient[179] to give legitimacy by acquiescence to what in fact amounts to the expression of the justices' own moral visions.[180] In a later work Perry gave a somewhat more refined invocation of the religious analogy, noting three elements of the interpretive or "prophetic" role: community, tradition (defined as the community's aspirations), and a foundational text;[181] he also conceded that our legal tradition demands that extratextual values be at least signified by the text, although he insisted that many of its provisions do signify fundamental aspirations of our society.[182] Other authors have developed similar ideas of an interpretive community with which the judiciary engages in a continuing exchange.[183]

A related analysis by Bruce Ackerman[184] acknowledges that the political expression which attains the level of constitution-making[185] is of a special kind which occurs only rarely. He insists, however, that it can occur in forms other than the formal ratification of specific texts. Ackerman maintains that this has occurred twice (and only twice) in our history: the post-Civil War period of Reconstruction and the New Deal of the 1930's. Each involved broad-based political action specifically focused on constitutional arrangements as currently understood, achieving consensus on fundamental values comparable

176. Id. at 26.

177. Michael Perry, *The Constitution, The Courts, and Human Rights* at 98-9 (1982).

178. Id. at 113.

179. In his first book he argued, after a review of those we have mentioned in our introduction, that the one control that is realistic in relation to particular decisions — as distinguished from those which affect the institution as a whole or are too cumbersome to mobilize often — is that of controlling jurisdiction, id. at pp. 126-139. In his later work, perhaps responding to reviews of the first which focused on this point (e.g., Alexander, "Painting Without the Numbers: Noninterpretive Judicial Review," 8 *U. Dayton L. Rev.* 447, 455-7 (1983)), he invokes the cumulative effect of all controls, but especially the appointment and amendment powers, as historically effective, Perry, supra n. 133, at 168-9.

180. Supra n. 177, at 123.

181. Perry, supra n. 133, at 136-7.

182. Id. at 133 ff.

183. See, e.g., Fiss, "Objectivity and Interpretation," 34 *Stan. L. Rev.* 739 (1982).

184. Bruce Ackerman, *We The People: Foundations* (1991).

185. He calls the American system a "dualist democracy", in which decisions are made by two agencies: the people and the government; the former engages in "higher lawmaking" and the latter in "ordinary lawmaking". Id. at p. 6.

to that of the ratifiers of 1788 and justifying judicial implementation of those values even though not clearly manifested in a legal text.[186]

The concept of a prophetic role for the Court as justifying judicial application of extratextual fundamental values is vulnerable at at least two points beyond the indeterminacy which it shares with all other theories of interpretation. First and foremost, there is objection to the assumption that the justices have any superior skills at identifying such values which justify allowing their judgments to prevail in a democratic system;[187] judicial "prophecy" is characterized by Ackerman as "flatly inconsistent with the principles of dualist democracy."[188] Further, one may dispute the assumption that the polity's opportunities for correcting judicial mistakes are sufficient to reconcile such review with the democratic system, or to prevent "judicial tyranny".[189]

F. Eclectic Theories

Finally we must mention some theorists who embrace all the above-mentioned forms of argument and offer more or less flexible guidelines for resolving conflicts between them. Philip Bobbitt has identified six "modalities" of argument (textual, historical, doctrinal, structural, prudential and "ethical") which he observes the Court utilizing with sufficient frequency and acceptance to justify their characterization as "legitimate".[190] No one of these "modalities", in his view, can be determinate enough to constrain the judges and also comprehensive enough to decide all cases; they are conventions or practices, each with its own constraints, but they are not verifiable statements of fact about an objective constitution, so that neither the "strict constructionist" insisting on the primacy of one source nor the "reconstructionist" seeing only politics fully understands the nature of legal reasoning.[191] Legitimacy, he argues, derives from the proper use of one or more of these modalities to rationalize a decision; what distinguishes legal interpretation from literary interpretation is the judges' obligation to reach a decision.[192] Finally he asserts that there is no overarching rule or value governing the choice among "modalities" for a particular case, only the consciences of the judges:

186. The argument for viewing Brown and Griswold as synthesis and interpretation rather than prophecy is developed in id. at 140-62.

187. See, e.g., Kay, "Moral Knowledge and Constitutional Adjudication," 63 *Tul. L. Rev.* 1501 (1989).

188. Ackerman, supra n. 184, at 139.

189. See, e.g., Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 198-202 (1988).

190. Supra n. 77, passim.

191. Philip Bobbitt, *Constitutional Interpretation* at 31 ff. (1991).

192. Id. at 39.

> . . .(T)he US Constitution does not endorse communal values, nor, with the single exception [of respect for individual conscience], particular individual values. . . .(T)hus when a constitutional decision is made, its moral basis is confirmed if the forms of arguments can persuasively rationalize the decision, and the decision is not made on grounds incompatible with the conscience of the decisionmaker. That is constitutional decision according to law.[193]

Richard Fallon[194] offers a similar typology of accepted forms of argument,[195] as well as a set of criteria for judging the usefulness of any theory about how those arguments should be used. The criteria for judging are whether the theory accurately describes modern practice, whether it is neither too rigid nor too indeterminate, and whether it recognizes the interdependence of the various factors (for example, that value judgments are pervasive in all constitutional argument). He notes three types of theory currently supported, all of which he considers inadequate by the above criteria: those which privilege a single factor, such as originalism; those which deny the existence of any rules governing choice among factors; and those which prescribe a weighing and balancing of all factors in each case. His own theory he labels "constructive coherence": like Bobbitt, he presupposes that all of the forms of arguments on his list are in regular use and therefore are legitimate; he observes that as the individual judges use them, they seldom find actual conflict between them; he proposes, therefore, that the actual practice of the typical judge is to begin with a more or less intuitive judgment about what result is "right", but to seek a result which most plausibly fits all the forms of argument. If there is in fact an unavoidable conflict between the different factors, he suggests as the most likely hierarchy the following, in descending order: text, original intent, theory or purpose, precedent, and value; the descent stops at that factor at which (in light of the higher ones) clarity is achieved in how to resolve the issue. Because all of the factors or forms are indeterminate to one degree or another, they are all candidates for accommodation with each other; because judges are given training and a process which promotes reflection and the art of reasoned explanation, they are peculiarly well qualified, in his view, to do this job.

IV. Conclusion

The exercise of constitutional judicial review by American courts has, as noted, not always been received with favor or even respect by

193. Id. at 169.
194. Fallon, supra n. 77.
195. They are: text, framers intent, theory (the purposes of particular provisions or arrangements), precedent, and (moral, social and political) values.

the rest of the national political and social community.[196] For the most part, however, the history of judicial review has been one of extraordinary success. As we indicated at the outset, the courts, in the exercise of judicial review, have had an enormous influence on the formulation of critical issues of national policy. That success could only be possible if the courts are regarded as legitimate decisionmakers. The fact of that legitimacy is beyond question. The explanation of it, however, remains, after all the theoretical work canvassed, still elusive.

Each of the theories of interpretation put forward has been subject to serious criticism and each, for reasons which have been mentioned, remains unsatisfactory from the viewpoint of political legitimacy. Even the most restrictive of them is liable to manipulation and, therefore, to a significant measure of indeterminacy. To the extent that the legitimacy of the process depends on the perception that the judges act not on the basis of their own moral or political convictions, but on some pre-existing source of authority, it is undermined by such manipulability. Each of these models, moreover, exhibits a varying degree of distance from the self-evidently legitimate constitutional text. It is perhaps an irony of American constitutional theory, that what a conception of judicial review gains in legitimacy by observable adherence to the constitutional text and history, it may lose because of the irrelevance of that static history and text to the changing problems presented by modern litigation, and of the unwillingness or inability of judges in courts of last resort to submit to these constraints.

In the end, we can only speculate that a happy combination of factors — the selection process which inevitably produces justices well steeped in the mainstream of political and legal thinking, the process of litigation which limits the occasions on which the constitutional judge may pronounce, the sense of caution and restraint which periodically leads to a retrenchment in judicial activity, and the public and academic debate on the propriety of judicial intervention, which itself at least indirectly influences the products of judicial review — all contribute to an inarticulate acceptance of the role of the courts. That acceptance has developed notwithstanding — indeed maybe because of — the fact that it cannot be clearly conceptually justified.

196. The most notorious example is the Dred Scott case, Scott v. Sanford, supra n. 31 above, one of the precipitating causes of the Civil War.