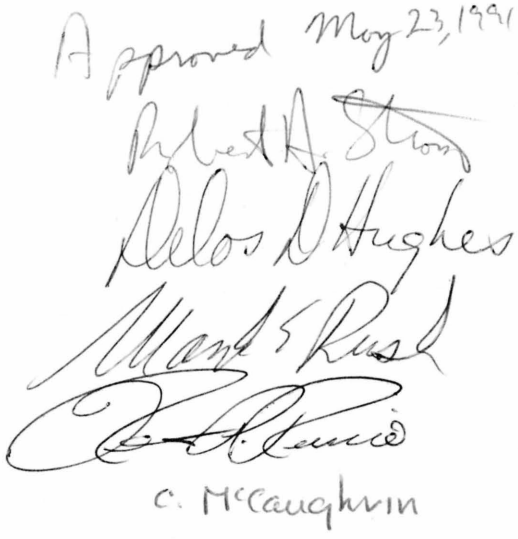
The *Problem of Arbitrariness* in American Jurisprudence



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Introduction

The debate over how to interpret the United States Constitution continues to be the most controversial one in the area of constitutional law. In recent years, with the rise of the New Right and its so-called original intent jurisprudence, the dispute has become even more acute. The controversy was publicized in 1985 by then Attorney General Edwin Meese when he criticized the methodology of Justice William Brennan who, before his retirement in the summer of 1990, was the Supreme Court's leading liberal.[1] Brennan was equally scathing in his reply, calling original intent "arrogance cloaked as humility."[2] In addition, the number of articles and books on constitutional interpretation has increased dramatically over the past decade.

The importance of the debate over the proper method of constitutional interpretation is not, however, limited merely to academic circles: some theory of judicial review, whether explicitly acknowledged or only implicit, must guide a judge's decision making. As Erwin Chemerinsky, a law professor at the University of Southern California, points out, "In Supreme Court opinions, interpretive approaches are often openly discussed and frequently decisive in explaining the results of particular cases."[3] And the manner in which courts--especially the Supreme Court--decide cases can have major implications for the rights we possess as citizens of this country. Cases such as *Brown v. Board of Education* and *Roe v. Wade* have drastically affected the lives of countless Americans.

Thus, an inquiry into what constitutes the correct approach to constitutional interpretation is of great significance, both intellectually and practically. This essay is intended to be such an investigation. It is reasonable to begin with an examination of the lines along which constitutional scholars are divided on this issue. Generally speaking, there are two schools of thought: interpretivism and noninterpretivism.[4] Interpretivists believe "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution."[5] If a judge goes beyond the text of the Constitution in order to decide a case, he *necessarily* injects his own value preferences into the process. The interpretivists claim that such a practice lacks democratic legitimacy because the judge, who is unelected, is, in effect, substituting his own value preferences for those of the legislature, and thus for those of the majority of citizens.[6]

According to the interpretivists, the Supreme Court's decision in *Griswold v. Connecticut*, the cornerstone of its ruling in *Roe v. Wade* (1973), is illegitimate. In this 1965 case, the Court invalidated Connecticut's birth control law, saying that it violated a person's "right of privacy" under the Ninth Amendment.[7] In its ruling, the Court reasoned that

> specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance . . . the right of privacy which presses for recognition here is a legitimate one. The present case, then, concerns a relationship lying within the zone of privacy created by several constitutional guarantees . . . We deal with a right of privacy older than the Bill of Rights.[8]

Interpretivists say that this decision solely reflects the subjective values of the justices: nowhere is a "right of privacy" mentioned in the Constitution; hence, the justices must have come to their decision via extraconstitutional means.

But that is inevitable, argue the noninterpretivists. They say it is simply impossible for a judge to rely solely on the text of the Constitution in deciding cases. The Constitution's important provisions, the First Amendment for instance, are too general, too open-ended to provide a judge the sort of guidance an interpretivist requires.[9] Noninterpretivists contend that what many interpretivists demand in terms of reliance on the text of the Constitution is well-nigh impossible. A judge, they believe, *must* look beyond the explicit language of the Constitution in order to perform his role as constitutional interpreter properly. If a judge is to rely solely on the text, they argue, many of the Supreme Court's most significant rulings would not have been possible:

> In the important cases [e.g., the *Legal Tender Cases, Brown v. Board of Education, Baker v. Carr,* and *Roe v. Wade*] reference to and analysis of the constitutional text plays a minor role. The dominant norms of decisions are those large conceptions of governmental structure and individual rights that are best referred to, and whose content is scarcely at all specified, in the written Constitution--dual federalism, vested rights, fair procedure, equality before the law.[10]

Of course, the claim that few of the Court's major decisions would be possible does not mean that interpretivists are wrong. To say that many of those decisions apparently would not be possible under the interpretivist methodology is simply to state a fact. If the point of such an observation is that we should abandon interpretivism precisely *because* those decisions would not have been possible, then that is a value-laden argument, and one may ask why it is that utilitarianism should be the deciding factor in constitutional interpretation.

In any case, noninterpretivists agree fully with interpretivists that the Constitution must serve as a starting point for a judge's decision making. They disagree over the extent

to which a judge is justified in going beyond the text in deciding a case. *Griswold v. Connecticut* provides an excellent example of how the two methodologies differ in approaching constitutional interpretation. The interpretivists say that the Ninth Amendment is so vague as to the sorts of rights it reserves as to be meaningless, that is, almost any right can be derived using its language. Nonetheless, the Amendment *was* ratified and it *does* say that citizens have fundamental rights against the state which are not enumerated in the Constitution. Yet the interpretivists, in effect, deny this. Therefore, in calling the Ninth Amendment meaningless, they are not being loyal to the text of the Constitution, which they claim is essential for judges to be.

The interpretivists do not believe the courts have the power to protect these fundamental rights, even though they see no problem with courts protecting, for instance, freedom of speech and press. The reason for this inconsistency in the interpretivist approach to constitutional interpretation is unclear. They do not explain *why* the Ninth Amendment is *sui generis*, that is, why it should not be enforced by courts in the same way that courts enforce the other Amendments.[11]

Noninterpretivists point out that the open-ended language of the Ninth Amendment *necessitates* a judge's going beyond the text of the Constitution. The logical inference is that judges, in making decisions about the rights Americans possess under its provisions, were not expected to be prisoners of the explicit language of the Constitution. Rather, they were to look to such things as the purposes of government, the political theories which influenced the framers, moral philosophy, and so forth. (The same process *must* be utilized in relation to most, if not all other Amendments as well, because their language does *not* provide

determinate answers. For example, what *exactly* is "the freedom of speech"? I dare say one cannot answer that question simply by reading the First Amendment.)

The problem is that exactly which sources should be consulted is not absolutely clear. The choice of sources could, no doubt, influence--if not determine--the manner in which a judge decides a case. For this reason the interpretivists wish to limit the discretion a judge may exercise by restricting the decision-making process to the text of the Constitution (which, as I have just argued, is futile in any case because of the vagueness of the Constitution's language, e.g., "the freedom of speech"). But unless they can show *why* the text should be a judge's sole referent, their insistence that it must be is, itself, utterly discretionary and thus, by their own standards, illegitimate. As U.S. Court of Appeals Judge Richard Posner makes clear:

> Even the decision to read the Constitution narrowly, and thereby "restrain" judicial interpretation, is not a decision that can be read directly from the text. The Constitution does not say, "Read me broadly," or, "Read me narrowly." That decision must be made as a matter of political theory, and will depend on such things as one's view of the springs of judicial legitimacy and of the relative competence of courts and legislatures in dealing with particular types of issues.[12]

Thus, the pure interpretivists must, of necessity, go beyond the text to explain why one should not go beyond the text--an obvious contradiction. But not all interpretivists demand a steadfast reliance on the language of the Constitution. For these interpretivists, it is the notion of the legitimacy of the judiciary in a democracy which compels them to limit the judge to using the text in deciding cases.

The general interpretivist argument is as follows. The United States is a democracy

and in a democracy the will of the majority should prevail. Therefore, when unelected judges reverse a decision of the legislature or "discover" new rights by way of arguments which cannot be reasonably inferred from the Constitution, they violate the democratic principles upon which that government is based.[13] The noninterpretivist response is that this nation is *not*, strictly speaking, a democracy, but a constitutional republic--one in which individuals are guaranteed certain fundamental rights against the state. Otherwise, there is no point in having a constitution in the first place. They argue that, in interpreting the Constitution, judges are authorized to overturn certain decisions of the legislative branch; namely, those which violate our constitutional rights. The noninterpretivists contend that judges can and, indeed, must look beyond the explicit provisions of the Constitution in order to protect fundamental rights, which greatly enhance our lives.[14]

The interpretivist rejoinder is that if the Constitution's provisions cannot constrain a judge, then nothing can: *any* ruling by a court would be permissible under the noninterpretivist scheme of interpretation. Such a situation would amount to rule by judicial fiat, with judges substituting their subjective value preferences for those of the majority: "a Supreme Court that makes rather than implements value choices cannot be squared with the suppositions of democratic society."[15] But, again, the noninterpretivists say that this nation is not a democracy, and that the interpretivists, particularly those such as Robert Bork, who believe that the specific intentions of the authors of the Constitution should guide a judge's decision making, are simply incorrect in assigning such weight to unfettered democracy, to which the majority of the framers were openly hostile.[16] Further, they argue, there are practical restraints on the judiciary, the most important of which is public opinion.

If the courts make rulings which outrage the public, they will lose their legitimacy, their perceived impartiality. This argument seems convincing, though the theoretical question of there being limits to the sorts of rights judges may deem constitutional is not so easily answered by the noninterpretivists.

Nor is it addressed by the interpretivists in a convincing manner. No one can seriously claim that, for instance, the meaning of the First Amendment is crystal clear. Rather, there is considerable room for judicial discretion in deciding what constitutes, for example, a free press. The judge must interpret the First Amendment in order to decide relevant cases. The same conditions apply to the Ninth Amendment, though it is more vague than the First. Both, however, are *indeterminate*, and therefore allow the judge discretion. The fact that the Ninth Amendment is, as it were, more indeterminate than the First Amendment is no valid justification for preventing the courts from interpreting the Ninth. There are no apparent grounds on which the interpretivists can successfully claim that courts can expound the former Amendment and not the latter. There is no difference between the two in terms of how they were ratified and thus their status as "the supreme law of the land." It follows that if the courts have the power to interpret the First Amendment, they have the power to interpret the Ninth Amendment, period.

The variety of rights a court may "find" in the Constitution using both interpretivist and noninterpretivist theories is substantial, which means that judicial power under either methodology is expansive. That expansiveness stems not from the theories, but from the vagueness of the language of the Bill of Rights and some of the later Amendments. Nonetheless, as the interpretivists argue, an unelected tribunal exercising such authority is

not easily reconciled with democratic theory, because the courts may overrule the decisions of the popularly elected legislature.

This difficulty is the reason why the interpretivists would not allow the courts to interpret the Ninth Amendment. This belief, however, raises other difficulties which they do not address. Why, for instance, can the courts interpret the First Amendment but not the Ninth? While the Ninth Amendment does allow the courts more "room" to acknowledge rights than, say, the First Amendment, the latter, because of its inherent indeterminacy, still allows the courts significant discretion in deciding what constitutes free speech. The power to interpret the First Amendment, in other words, gives the courts significant power vis-a-vis the elective branches of government. Yet the interpretivists accept the court's power to decide First Amendment cases. Thus, it is not clear why the interpretivists, as concerned as they are about a powerful judiciary, allow the courts such authority.

A more fundamental problem with the interpretivist position is that this nation is not a democracy as interpretivists define the term. Their appeals to majoritarianism are not consistent with either the political theory which underlies the Constitution *or* its explicit provisions, to which they claim fidelity.[17] So one may then ask of the interpretivists, what is the basis for the claim that "democratic" theory is paramount in the debate over constitutional interpretation? Their response, as I will show in Chapter 3, is a most unconvincing one.

The interpretivists are correct, however, in their insistence that legitimacy is an integral part of the debate over how the Constitution should be interpreted. The fundamental question in this debate is, *what is the correct theory of constitutional*

interpretation? Answering this question necessarily involves a determination of the extent to which judges may legitimately go beyond the explicit language of the Constitution in interpreting that important document. In fact, as I will argue, the notion of the legitimacy not only of the judiciary, but also of the framers in discarding the Articles of Confederation in favor of a new constitution (that is, the legitimacy of the Constitution, itself) will play a crucial role in determining how a judge should interpret the Constitution. The legitimacy of the actions of the framers during the Philadelphia Convention will be especially important in relation to the formidable jurisprudential difficulties presented by *the Problem of Arbitrariness*, which I discuss in Chapter 5.

Both the interpretivists and the noninterpretivists claim that their approach to constitutional interpretation is the correct one. But before such a claim can persuasively be made, there must be some referent, some sort of *correctness criteria* by which to evaluate a particular theory of interpretation. *What criteria, then, can one use to choose from among alternatives the correct theory of interpretation?* Addressing this question will be the central purpose of this essay. This question is not easily answered, because the Constitution gives no explicit criteria (or rules) for its own interpretation. The matter is further complicated by the fact that much of the debate over how to interpret the Constitution has focused on one or two issues (e.g., "democratic" legitimacy, the rule of law, human dignity), the purpose of which seems to be to discredit the opposition rather than to make a positive assertion that a particular approach is correct. According to Ely:

> Each side has an interest in maintaining the idea that these [i.e., interpretivism and noninterpretivism] are the only choices. One

> racks up rhetorical points by exposing the unacceptability of the only alternative to one's view; if the debate is defined thus, that is quite an easy task--for both sides, and for much the same reason.[18]

To be sure, such criticism can be useful in helping one to avoid pitfalls one is certain to encounter in an undertaking such as mine. But the extent to which such argumentation is useful in the derivation of positive, or prescriptive, correctness criteria, and not just negative, or proscriptive, criteria, remains to be seen.

The many difficulties aside, I will attempt to compile a list of correctness criteria which could then be applied to the various approaches to interpreting the Constitution, in the hope of determining which theory, if any, is correct. But what is "correct"? Such a question is, of course, never easily answered in any complete sense, but I will attempt to provide an adequate response. I do *not* mean by "correct" a theory which would compel a judge to decide every case brought before him in one way rather than another: "Constitutions, like well-drafted contracts, limit the domain of permissible choice, but they do not dictate the outcome in all cases."[19] After all, if that were the case, this essay would be unnecessary.

Still, the Constitution is of fundamental importance to the determination of "correctness." The correctness of a theory of constitutional interpretation depends upon certain criteria. In order for one to select these criteria there must be some way to distinguish between valid and invalid ones. If there is no way to do so, then *any* criteria could be used to evaluate a theory, in which case *any* theory could be considered correct. What determines the validity of a given criterion? The values (e.g., the separation of powers,

limited government) legitimated by "the people's" ratification of the Constitution. This claim conforms to the idea of representative government, that is, in adopting the Constitution as the framework for governance, the founding generation delineated the values that "count" in American public affairs, including how the Constitution should be interpreted. Subsequent generations have, at least in a general sense, affirmed those values. Consequently, the legitimacy of those values--and thus, their relevance to this essay--persists.

If the assumptions necessary for the above argument are sustainable,[20] then it follows that a correct theory of constitutional interpretation is one whose components are consistent with, and can be logically inferred from such things as the process through which the Constitution was drafted and ratified, the political theories which influenced the framers, the ideas and aspirations embodied in the Constitution, and the structure of our governmental system. More empirically, *I define "correctness" in terms of the correctness criteria I will amass in this essay*. Thus, a theory of constitutional interpretation is correct in so far as it accords with the list of criteria presented below. An explanation will accompany each criterion I select. Therefore, the reader will be able to judge, on an individual basis, the appropriateness of each of the criteria I have chosen.

Simply reading the Constitution will not yield the sorts of criteria which would allow us to choose interpretivism over noninterpretivism, or vice versa, as the interpretivists must reluctantly admit.[21] Thus, one must look to other sources for guidance, which I do in Chapter 2. An obvious point at which to begin the search for criteria is the Philadelphia Convention. The reasons for calling the Convention, the political theories which influenced the thinking of the framers, the legitimacy of certain of the actions of the framers during the

Convention, all of these things may very well yield correctness criteria. As we shall see, though, there are several problems associated with drawing conclusions from the Convention, the most important of which are the questionable accuracy and incompleteness of the record of what transpired there.[22]

In Chapter 3 I examine so-called original intent jurisprudence, which is a variety of interpretivism, focusing my analysis on the work of Robert Bork; the work of John Hart Ely, who advocates a "participation-oriented, representation-reinforcing approach to judicial review"[23]; and the noninterpretivist approach propounded by Ronald Dworkin in his *Taking Rights Seriously*.[24] Each of these authors *claims* that his theory is correct. I will scrutinize those claims in an attempt to derive more correctness criteria.

Why these schools of interpretation and not others? Why these particular authors? I have chosen original intent jurisprudence from among the various interpretivist theories because, since the Reagan presidency and the concomitant rise of the New Right, intentionalism has become increasingly influential within legal circles, if for no other reason than because of Reagan's appointment of intentionalist judges to the federal bench.[25] It is important to evaluate the correctness of intentionalism, because it has serious implications for the rights citizens may claim in the near future. Further, intentionalism is representative of interpretivism *in the sense that* it shares the same perception of the relationship between judicial review and democratic theory. I selected Robert Bork's work because it is most often cited in the literature, and because he is certainly the best-known, if controversial, advocate of original intent jurisprudence.

I have decided to examine Ely's *Democracy and Distrust* because in it he challenges

both interpretivism and noninterpretivism, and instead argues for a third alternative. He adds a different perspective to the debate, which may be helpful. To Ely the judiciary is a referee of the political process. His theory "bounds judicial review under the Constitution's open-ended provisions by insisting that it can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack."[26] This may sound like interpretivism, but Ely is adamant in his denial of this. His reasons for doing so will be made clear in Chapter 3.

Dworkin is an obvious choice as a representative of noninterpretivism because he is one of the most influential legal philosophers of our time. To be sure, he has been widely criticized; but that has occurred precisely because of his influence within the field of jurisprudence. Furthermore, Dworkin employs moral philosophy, as do most noninterpretivists (e.g., Justice Brennan and his notion of the respect for "human dignity" as *the* criterion for deciding certain cases).[27]

I suppose the simple answer to the question, why these theories and not others? is that time considerations necessarily limit the number of theories I am able to examine. But there is, nevertheless, a more substantial explanation. These theories are the ones most frequently discussed, if criticized, within the literature. This suggests that the possibility of these theories being "correct" is greater than for others. If that is the case, the theories I have chosen to examine provide the best opportunity for deriving correctness criteria (from theories of constitutional interpretation).

None of this is to suggest that the theories of constitutional interpretation which I have chosen will not, for instance, prove to be wedded to one's political outlook, or to be

otherwise highly subjective. It is not immediately obvious that they are. Nor is it necessarily the case that any of the theories I have chosen to examine are "correct." I cannot even begin to make such a determination until after I have compiled a list of correctness criteria for evaluating theories of constitutional interpretation. In Chapter 4 I apply the criteria derived in Chapters 2 and 3 to the three theories examined in this essay. The conclusions reached as a result of this evaluation, I will argue, apply not only to those three theories, but also to interpretivism and noninterpretivism more generally.

If nothing else, this essay will at least provide a groundwork for further attempts to accumulate a set of criteria to evaluate the correctness of the various approaches to interpreting the Constitution--*if* such an undertaking is possible; *if*, that is, there is a correct theory.

In Chapter 5 I introduce *the Problem of Arbitrariness*, which brings into question the very notion that there can be a "correct" theory of constitutional interpretation. As I have already stated, the legitimacy of certain of the actions of the delegates to the Philadelphia Convention in 1787 are suspect. *The Problem of Arbitrariness* stems from this controversy.

I have chosen to introduce this problem *after* I have evaluated the three theories of constitutional interpretation according to the criteria I have compiled because *the Problem of Arbitrariness* challenges the notion that any valid assumptions can be made as to which factors "matter" in determining the "correct" approach to interpreting the Constitution. If assumptions of this sort cannot be made, then no "correctness" criteria can be chosen, which means, in turn, that there can be no "correct" theory of constitutional interpretation.

Now, the assumptions I make in this essay are, for the most part, the same ones made

by many constitutional scholars. Thus, if *the Problem of Arbitrariness* is able to confound even the making of such uncontroversial, mainstream assumptions, the very foundations of American jurisprudence would then require serious reexamination.

Finally, in Chapter 6, I conclude this examination of an important question in American jurisprudence.

2

The Making of the Constitution

In May of 1787, a group of twenty-nine men representing nine of the thirteen states gathered in Philadelphia for the purpose of revising the Articles of Confederation. The document these men produced, the United States Constitution, established the basic governmental framework within which we operate to this very day. It is helpful, then, to examine the events which led to the calling of the Philadelphia Convention and the ideas which influenced the decision making of its delegates in order to derive some of the correctness criteria I will use in my evaluation of the three theories of constitutional interpretation described in Chapter 1.

In choosing correctness criteria, I begin with the presumption that certain principles (e.g., the separation of powers, limited government) underlie our constitutional system, *and* that these are relevant to what constitutes the "correct" method of constitutional interpretation. Without this premise, the quest for "correctness" in judicial review is utterly foolish, even impossible. Why? Because absent the assumption that those values legitimated by the ratification of the Constitution--or, at any rate, some idea of the legitimacy of certain criteria--are what "count" in defining the "correct" theory of constitutional interpretation, *anything* can be chosen as correctness criteria. In that case, *any* theory of constitutional interpretation could be deemed "correct," depending, of course, on which criteria--and one

may choose any--one selects in order to evaluate a particular theory. If every theory is equally "correct," then the term "correctness" is, for our purposes, meaningless. (In Chapter 5 I discuss these matters in greater detail.)

Since, in this Chapter I am interested solely in generating correctness criteria, I limit the analysis to those events and ideas which have some bearing on the role of the judiciary within the United States system of government.

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There is general agreement among scholars about the reasons for calling the Philadelphia Convention. The primary one was the weaknesses of the Articles of Confederation.[28] The national government was impotent. It could not levy taxes, which meant it was often on the verge of financial collapse. It did not have the funds to provide for the nation's defense. It could regulate neither interstate nor foreign commerce. Many bills required the votes of nine of the thirteen states, which were difficult to muster, especially since "a state frequently lost her vote because of differences among her delegates."[29]

The states were the real centers of political and economic power. Each state issued its own currency, which made interstate commerce difficult. There were also conflicts between creditors and debtors over the value of currency. In 1786, one group of debtors in Massachusetts, led by Daniel Shays, took up arms and shut down the courts in several counties so as to prevent the state from seizing the farms of those who owed back taxes. The

near-bankrupt national government was unable to put down this insurrection. Instead, the state government raised a contingent of troops and quelled the uprising. This event hastened the calling of the Philadelphia Convention, for it showed just how vulnerable to rebellion the nation was under the Articles of Confederation.[30]

Since the Convention was notably deliberative, its debates are a rich source for the arguments that carried the day and led to the drafting of the Constitution. But, while there was an official journal of the proceedings, it "was a poorly kept set of dry bones which recounted motions and votes but no speeches."[31] Further, that journal has been shown to contain several important mistakes.[32] The notes kept by James Madison are generally considered to be the most complete account of the Convention. But, here too, there are difficulties. William Crosskey argues that Madison *deliberately* falsified the statements made by several of the delegates, including those he himself made.[33] This claim is based on the fact that, shortly after the Convention, Madison renounced the nationalistic thinking responsible for his substantial contributions to the provisions of the Constitution, and instead embraced the doctrine of state sovereignty. Furthermore, notwithstanding the questionable veracity of Madison's notes, the judiciary was one of the least debated issues at the Convention. If the paucity of Madison's notes on the Convention as a whole is notable, those concerning the judiciary are especially meager.[34] The delegates apparently debated jurisprudential matters very little, if at all.

Although we may not be able to discover in any great detail what the framers thought, particularly in regard to the judiciary, we do have a strong sense of the general ideas which motivated them; and some of these, I will argue, can produce correctness

criteria.

The governmental structure created by the Constitution makes clear that the majority of the delegates favored a strong national government.[35] The Articles of Confederation were inadequate both in providing for the defense of the nation against foreign powers and in quashing insurrection at home. The monetary system was in a shambles (because each state printed its own currency) and interstate commerce was inhibited by one state's imposing tariffs on the goods from others. Thus, the delegates wished to remove those powers from the states and transfer them to a strong national government, which is exactly what the Constitution does. This fact provides the first correctness criterion:

1. A theory of constitutional interpretation should help to maintain a strong national government.

The argument for including the above as a correctness criterion is as follows. It was agreed by the delegates to the Philadelphia Convention as well as those to the state ratification conventions[36] that, in light of the dangers of a weak central government as evidenced under the Articles of Confederation, this nation should have a strong national government. Thus, the federal judiciary, which is of course a part of the national government, should decide relevant constitutional cases in such a way as to maintain a strong national government.

The Supreme Court's decision in *McCulloch v. Maryland (1819)*, which propounded the doctrine of federal supremacy, serves as an example of the application of this

criterion.[37] Briefly, this case involved the power of Maryland to levy a tax on the bank notes issued by any bank (specifically the Baltimore branch of the Bank of the United States) not chartered by that state. The Court addressed two questions. First, does Congress have the power to created a Bank of the United States? The Court argued that, under the "necessary and proper" clause of the Constitution (Article I, section 8, clause 18), Congress did have such a power. The second question, the Court's answer to which involves an application of the correctness criterion chosen above, was, does the state of Maryland have the power to tax the Baltimore branch of the Bank of the United States? The Court said no, arguing that the Constitution is the supreme law of the land, and thus takes precedence over state laws, when the two conflict. If, the Court further reasoned, the state of Maryland could frustrate federal laws through taxation, then the Constitution would soon be relegated to coequal status with, if not subordinate status to, the various laws enacted by the states. This would, in turn, lead to a state of national chaos similar to the one that existed under the Articles of Confederation, which would be wholly undesirable, and which the Constitution was designed to prevent.

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The delegates to the Philadelphia Convention were influenced by the writings of seventeenth- and eighteenth-century thinkers.[38] The two philosophers most important to the judicial arrangements of the proposed constitution, though, were Montesquieu and Locke. Montesquieu's book *The Spirit of the Laws* greatly influenced the thinking of the

framers, and of Madison in particular. It is not an exaggeration to say that two of Montesquieu's (closely related) principles--the separation of powers and the system of checks and balances--are the linchpins of our constitutional system.

Montesquieu saw the separation of the legislative, executive, and judicial functions of the government as being necessary to prevent the excessive concentration of power in any one governmental entity, which would undermine liberty.[39] Thus, we see in our own national government, the separation of those powers into three branches. From this important principle comes a second correctness criterion:

2. A theory of constitutional interpretation should, as much as is practically possible, preserve the separation of powers.

The reasoning behind my selection of this principle as a criterion is analogous to that used in deriving the first criterion. Since the separation of powers is a crucial structural element of our constitutional system, federal courts should rule in relevant cases in such a way as to promote it.

Immigration and Naturalization Service v. Chadha (1983) illustrates the proper application of this criterion.[40] This case involved Congress's authority to overturn the decisions of executive agencies, which is known as the legislative veto. Jagdish Chadha, an exchange student whose visa had expired, appealed to and won from the INS a suspension of his deportation. But a year later the House of Representatives passed a law that overturned this INS decision, and so Chadha again was told he would have to leave the

country. He then appealed this decision, and his case eventually went to the Supreme Court. The Court agreed with Chadha's contention that the legislative veto violated the separation of powers doctrine, and was thus unconstitutional. The legislative veto violated the separation of powers because the president could not veto the congressional resolution through which one house of Congress annulled the decisions of executive agencies.[41] This, the Court reasoned, would give Congress more power than the framers thought it wise for the legislative branch to exercise.

Practically speaking, however, there cannot be a total separation of powers. Each branch requires the other two in order for the government to function properly. The legislative branch, for instance, cannot administer the laws it passes; it requires the executive branch for that purpose. The judiciary cannot enforce its rulings without the help of the executive branch, nor can it operate without funds from Congress. Montesquieu and the framers recognized the need for the three branches to be connected in some way, because each is dependent on the other two to varying degrees. But the danger was that one branch would become subservient to another unless each was given the ability to act as a check on the power of the other two.

The danger of the usurpation of power was to be reduced by a system of checks and balances. For instance, the president may act as a check on the power of Congress through his use of the veto, which, in turn, Congress may override if it musters the two-thirds vote (in each chamber) required by the Constitution; the judiciary may rule laws and executive actions to be unconstitutional; the president nominates and Congress either confirms or rejects federal judges and certain executive officials. A third correctness criterion, then, is

clear:

3. A theory of constitutional interpretation should require that courts operate consistent with the system of checks and balances which underlies our constitutional system.

Though obvious in the general sense in which it is stated above, exactly what this criterion calls for the courts to do is more controversial. At the simplest level of analysis, the role of the judiciary is of course to rule on the constitutionality of certain laws and executive actions. But, going beyond this elementary statement, one must ask, should a court invalidate only those laws which are clearly in violation of constitutional provisions, or should it be more assertive vis-a-vis the other two branches by taking on more of a policy-making role? That cannot be answered by this criterion alone--in fact, it begs this central question. In other words, this criterion does not at all favor interpretivism any more than it does noninterpretivism. (The same may be true of other criteria I generate in this essay, if looked at only individually. But I hope to show that, when taken as a whole, the list of correctness criteria *will* allow one theory of constitutional interpretation to be chosen over others. Therefore, it is important not to come to conclusions about any particular criterion until the complete list has been compiled: some criteria will help to clarify the requirements of others, as I will show in Chapter 4.)

It is more difficult to derive correctness criteria from the work of John Locke, because he influenced many of the theorists whose work, in turn, influenced the framers.[42] The

problem is aggravated by the fact that it is difficult to apply his work to the field of constitutional interpretation. Nonetheless, at least two of his concepts serve the purposes of this essay. The first is his notion of limited government.[43] Locke believed that the people entrusted certain powers to the government "for the mutual preservation of their lives, liberties, and estates, which I call by the general name, property."[44] But ultimately, power is derived from society as a whole. Therefore, only those actions which have been sanctioned by the people may be legitimately exercised by the government.

The framers adopted Locke's concept of limited government, saying that the legitimacy of the Constitution rested on the consent of the governed.[45] It follows, then, that no government official can legitimately employ any powers other than those provided for under the Constitution. From this arguments comes a fourth correctness criterion:

4. Consistent with the notion of limited government, a theory of constitutional interpretation should prevent a court from exercising arbitrary power, that is, power not granted to it under the Constitution.

Now, the reader may be wondering exactly how this criterion differs substantially from criterion 3 (checks and balances). The answer is, whereas criterion 3 provides the judiciary with a justification for restraining the power of the other two branches of government, criterion 4 furnishes a philosophical reason for the court to be "restrained" in the exercise of its *own* power, being sure not to exceed the authority delegated to it by the people through the Constitution.

The reader may also be tempted to conclude that criterion 4 is clearly a strike against noninterpretivism--quite the contrary. To be sure, if the Constitution does not give the judiciary the power to determine exactly which rights are fundamental, and to protect them, then, by definition, when it does so it violates the principle of limited government. On the other hand, if the judiciary is empowered to ascertain rights not explicitly found in the Constitution, then in such instances there can be no charge of its exercising arbitrary power. Surely the judiciary is so empowered. Both interpretivists and noninterpretivists agree that the judiciary has the power to define and protect enumerated rights (e.g. free speech, free press). The interpretivists, unlike the noninterpretivists, do not believe that the court may legitimately decide which *unenumerated* rights are given constitutional protection against the state and the majority.

As I argued in Chapter 1, however, this interpretivist position is untenable, because once one acknowledges that the court has the power to interpret the First Amendment--and the court, because of the Amendment's inherent vagueness, must *interpret* it and in so doing define its "precise" meaning--it follows necessarily that it has the power to interpret the Ninth Amendment. Both Amendments were ratified. Both have the same legal status. Thus, absent specific constitutional language mandating that the judiciary treat the Ninth Amendment differently than it treats the others, there is no constitutionally legitimate reason for it to do so. There is no such provision in the Constitution. Therefore, the judiciary can and, indeed, *must* approach the resolution of legal matters involving the Ninth Amendment in the same (general) manner in which it does those involving the other amendments to the Constitution.

The second Lockean concept I wish to examine is that the individual has certain inalienable rights. (This is one of the ends to which limited government is a means.) According to Locke, the right to property is central, for it serves as "protection against power of others--particularly the power of government or of custom or of privilege."[46] Locke meant by "property" not simply tangible things (e.g., land and money), but also intangibles such as one's life and freedom. The framers shared a similar notion of inalienable rights, and the purpose of the Bill of Rights was to ensure such rights.[47]

No one could enumerate exactly which rights either Locke or the framers thought to be inalienable ones. Doubtless, they themselves had only a general sense of what was meant by that term; and certainly each individual framer would disagree whether some rights were inalienable. What is important here is that Locke considered the rights of the individual to be very important. The framers, under Locke's influence, likewise believed that the protection of individual rights was one of the primary purposes of government. Consequently, this conviction provides a fifth criterion:

5. A theory of constitutional interpretation should pay special attention to the protection of individual rights

This criterion in no way limits the responsibility for the protection of individual rights to the judiciary. The legislative and the executive branch are constitutionally required to do so as well. However, the framers saw the judiciary's role in ensuring rights as predominant among the three branches of government. An argument for this view is part of the examination of three theories of constitutional interpretation in Chapter 3, below.

3

Three Theories of Constitutional Interpretation

In order to derive additional correctness criteria, I will examine three theories of constitutional interpretation in this chapter. They are: original intent jurisprudence, as propounded by Robert Bork; John Hart Ely's "participation-oriented, representation-reinforcing approach to judicial review"[48]; and Ronald Dworkin's noninterpretivist approach, as elaborated in his *Taking Rights Seriously*. Such an examination is reasonable because each of these three authors *claims* that his theory is correct. In order for their claims--or anyone's, for that matter--to be meaningful, these theorists must have in mind certain criteria for determining the correctness of a given theory of constitutional interpretation. The purpose of this chapter is to ascertain those criteria and to determine their validity, and to generate other valid criteria not explicitly mentioned by the authors, but which are necessary implications of their theories.

As I suggest in Chapter 2 (see pp. 16-17), the validity of a correctness criterion depends on the legitimacy of certain principles, ideas, and procedures (and on the illegitimacy of others). Otherwise, *any* criteria could be used to evaluate a theory of constitutional interpretation, which means that *any* theory could be considered correct (depending, of course, on the criteria one chooses). In this chapter, as in Chapter 2, I operate under the assumption that those values (e.g., governmental institutions, principles, procedures, etc.) legitimated by the ratification of the Constitution--and *only* those--are what

"count" in evaluating the validity of certain criteria. Absent this assumption, it makes no sense to speak of a "correct" theory of constitutional interpretation: correctness depends on the criteria one chooses, and (without the above assumption) one may choose any.

I turn now to an examination of the jurisprudence of Robert Bork.

* * * * * * * * * * * * *

In "Neutral Principles and Some First Amendment Problems," Bork asserts that a court's decisions must be guided by "neutral" principles, and not by the mere value choices of the judges.[49] By neutral principles, he means ones which are applied to all similar cases in the same manner. He does not mean that the principles themselves are neutral, for a constitutional principle--even if only a procedural one--must contain the political values of its authors and, therefore, of "the people," and thus cannot be "neutral" in the sense of containing no value preferences.[50]

The "original intent" of the framers of the Constitution, Bork argues, is the only criterion that should guide a court's principled evaluation of a law's constitutionality. This is so because the framers succeeded in having the Constitution ratified by "the people," and the views of "the people" must be controlling unless reversed by constitutional amendment. Otherwise, there can be no limit to judicial power because, in deciding cases, judges could then selectively choose whichever criteria they like, and would presumably do so based on their political preferences. Such a state of affairs would amount to rule by judicial decree, and would clearly be inconsistent with our democratic system.[51] He says that where the

Constitution is silent on certain political values, the courts must defer to the legislative branch the choice of whether or not the values in question are to enjoy legal protection.

Bork in no way suggests that this nation is an unfettered democracy, in which every right can be abolished at the whim of the majority. Rather, he recognizes that this nation is a constitutional republic, in which certain fundamental rights, such as the right to express your opinion, or the right not to be searched by the police without probable cause, are beyond the reach of negation by the majority. Such rights are guaranteed by the Constitution, and it is the role of the courts to ensure their protection.

But Bork insists that the courts only enforce those rights which are clearly enumerated in, or may be logically inferred from, the explicit language of the Constitution and/or the original intent of the framers:

> Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of the majority by, the Constitution.
>
> . . . [I]t follows that the [Supreme] Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.[52]

Thus, the Supreme Court's rulings in *Griswold v. Connecticut* and *Roe v. Wade* are illegitimate in Bork's view, because the reasoning which underlies them cannot be inferred from the original intent of the framers. Put differently, in these cases the Court is simply imposing its value preferences on the nation; the Court is a "naked power organ."[53] Bork asks: If the Supreme Court is going to engage in political decision-making, why shouldn't its membership be electorally accountable?

I turn now from the exposition of Bork's general jurisprudential thinking to a critique of it, and to a more substantial exploration of his methodology. The first question proponents of original intent jurisprudence must answer is whose intent is controlling. Which group of men comprises "the framers"? The process through which the Constitution was ratified involved not only the delegates to the Philadelphia Convention, but also the members of the Confederation Congress, and the delegates to the twelve state ratifying conventions. (Recall that Rhode Island never called a ratifying convention.) If the proponents of original intent cannot provide a satisfactory answer to this question, that is, if they cannot demonstrate that what they assert must be done can, in fact, be done (namely, the determination of the intent of the framers), then original intent jurisprudence is stillborn.

Bork is adamant in his insistence that the intent of "the Founding Fathers" must be strictly adhered to by judges in deciding cases. Yet *nowhere* does he explain just who constitutes the framers.[54] The best response Bork gives is the following:

> What is the "meaning" of a law, that essence that judges should not change? It is the meaning understood at the time of the law's enactment. What the Constitution's ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean.
>
> . . . The original understanding is thus manifested in the words used [in the Constitution] and in secondary materials, such as debates at the conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.[55]

This passage, of course, begs the question, what did the framers (whoever they were) intend? Does it even makes sense to speak of the group of men that together ratified the

Constitution as having a single, unified intent?[56] Surely there must have been disagreements about what a provision meant, even among those whose political outlooks were similar. And, given that there was disagreement, should we assign more weight to, say, Madison's commentary on a certain provision than we do to the views of less well-known delegates?

The convention debates often provide us with little guidance as to what "the framers" intended, because the record of what transpired at the Philadelphia Convention, in Congress, and at the several state conventions is inadequate in that respect.[57] Another of the references Bork urges us to consult, public debate, is likewise unhelpful. In many cases, an examination of the public debate merely shows that *there was disagreement* about what certain provisions of the Constitution meant.[58] Indeed, our present debate over what the Constitution means should bring into question the notion that its meaning was ever really settled in any precise sense. And remember, Bork's jurisprudence requires a great deal of accuracy as to what a certain provision means.

Simply looking at constitutional language will not do either, because the most important provisions of the Constitution are "majestic generalities."[59] What is, for example, "the judicial power of the United States" (Article III, Sec. 1)? "the executive power" (Article II, Sec. 1)? what unenumerated rights are guaranteed by the Ninth Amendment? Bork does not dispute that reasonable people will sometimes disagree about what a certain provision means. But when one considers the utter vagueness of the Ninth Amendment, the potential for differences of opinion is considerable. (Of course, Bork would say that such determinations of rights should be left to the legislative branch. I will evaluate this claim below.)

A further, and perhaps more fundamental, difficulty with original intent jurisprudence stems from the question of whether or not "the framers" even *intended* for their specific intent to bind subsequent generations.[60] First of all, "no official record of the proceedings in Philadelphia was ever published, an incomprehensible oversight if it had been expected that future interpreters would be guided by the Framers' intentions."[61] Second, given the general language of the important provisions of the Constitution, it is unlikely that the framers had any such expectation in the case of those provisions. After all, the Constitution was written so as to construct a framework within which our polity could adapt to changing circumstances; thus, the Constitution's provisions would "gather meaning from experience."[62] The use of specific language is inconsistent with such a goal. But in the instances in which they wanted their intentions to be adhered to by subsequent generations, the framers used very specific language. For example, they specified that any person who runs for president must be at least thirty-five years of age.[63]

A third difficulty with Bork's claim is that the historical evidence does not suggest that the framers, or most anyone, for that matter, believed that the interpretive strategy advocated by Bork was proper. Rather, many believed that the "plain" meaning of the text of a legal document should guide a judge's decision making:

> The practice of statutory interpretation from the 18th through at least the mid-19th century suggests that the adopters assumed--if they assumed anything at all--a mode of interpretation that was more textualist than intentionalist. The plain meaning was frequently invoked: *judicial recourse to legislative debates was virtually unknown and generally considered improper.* Even after reference to extrinsic sources became common, courts and commentators frequently asserted that the plain meaning of the text was the surest guide to the intent of the adopters.[64] [italics mine]

James Madison, who is often called the "father of the Constitution" because of his central role in drafting many of its important provisions, himself calls into question Bork's claim about the intent of the framers. Speaking on the floor of Congress in 1796, he said, "Whatever veneration might be entertained for the body of men who formed our Constitution, the sense of that body could never be regarded as the oracular guide in expounding the Constitution."[65] This assertion by one of the key Convention delegates delivers a devastating blow to Bork's original intent jurisprudence.

In light of the above evidence, Bork's assertion that judges must adhere to the specific intentions of the framers cannot, paradoxically, have as its origin the intentions of the framers. Therefore, Bork's claim must rest on his conception of the type of constitutional republic the United States is--there is no other way for it to be valid. In Bork's view, the judiciary has a significant policy-making ability if not restrained in some way. He sees this power as illegitimate, as inconsistent with democratic theory. Thus, he sets out to construct a theory of constitutional interpretation whose primary purpose is to bridle the judiciary. This is yet another strike against original intent, for the framers did *not* see the judiciary as posing much of a threat to individual rights.[66]

Nevertheless, what better way is there to prevent the judiciary from making value judgments in deciding cases than to limit its choice of values to those of the framers, and to leave all other value choices to the legislature? In this manner, judges may apply "neutral" principles, the framers' value judgments, in deciding cases, and refrain from imposing their own values on the democratic society. But in order for this theory of interpretation to hold water, Bork must somehow show that our governmental system is primarily majoritarian.

Otherwise, the theory is simply Bork's vision of what democratic society "should" be, in which case he is imposing his political values on society (through his advocacy of original intent jurisprudence)--the very thing he would prohibit judges from doing.

There can be no doubt, however, that the Federalists, at least, were fearful of the sort of majoritarianism which original intent requires.[67] Madison opens *The Federalist No. 10*: "Among the numerous advantages promised by a well-structured Union, none deserves to be more accurately developed than its tendency to *break and control the violence of faction*" (italics mine). In *The Federalist No. 51* Madison says that, "In republican government, the legislature necessarily predominates. The remedy for this *inconveniency* is to divide the legislature into different branches" (italics mine). Clearly the Federalists--who, after all, were successful in their attempt to have the Constitution ratified--were not majoritarians to the extent that original intent requires.

One of the basic principles that underlies our governmental system is that individuals have fundamental rights which are beyond the reach of both the government and majorities. Bork does not disagree with that statement. But he does take issue with noninterpretivists in regard to the judiciary's authority to "protect" certain fundamental rights not explicitly granted in the Constitution (e.g., the rights "in" the Ninth Amendment). Bork's claim is that, consistent with "democratic" theory, judges must defer to the legislative branch on all determinations of unenumerated rights, "because a Court that makes rather than implements value choices cannot be squared with the presuppositions of a democratic society."[68]

Or can it? If a court is authorized to do so, then it can legitimately do so. We see, then, that Bork begs the question of which branch is authorized to protect these rights. And

it is important to realize that Bork's contention above is not "deferential" or "neutral," but reflects as political a choice as any. Specifically, his view of the role of the judiciary in American society favors majoritarianism over the protection of individual rights.[69] Unless he can justify this view, we must conclude that, in propounding original intent, he is imposing his own "presuppositions" on society. And as I have already shown, Bork cannot rely on the intent of the framers in making such a claim, for the tolerance they entertained for majoritarianism does not even begin to approach his.

The central question is whether or not the judiciary is authorized to protect unenumerated rights. If we take Madison and Hamilton to be authoritative on this matter, then Bork is again refuted. In his push for the ratification of the Bill of Rights, Madison said before Congress that, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." He went on to say that the judiciary will be an "impenetrable bulwark against every assumption of power in the legislative or executive" branches and "be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights [i.e., the Bill of Rights]."[70] Now, while these statements do not exclude the other branches from protecting fundamental rights, they do suggest that the courts were to play a significant role in such protection.

Hamilton, in *The Federalist No. 78*, says:

> By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority... Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty must be to declare all acts contrary to the manifest tenor of the Constitution void. *Without this, all the reservations ofparticular rights or privileges would amount to nothing....*The interpretation

> of the laws is the *proper and peculiar province of the courts*. A constitution is, in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. (Italics mine.)

Clearly, Hamilton saw the role of the courts in protecting fundamental rights as preeminent among the three branches of government. In light of these comments by two of the leading Federalists--two men Bork certainly considers to be framers--what are we to make of Bork's claim that the judiciary should be deferential to the legislative branch when it comes to the protection of unenumerated rights?

The proposition that one of the major purposes of the Constitution is to secure to individuals certain fundamental rights against the majority, and the proposition that our constitutional system is designed to do just that, lead necessarily to the conclusion that the judiciary *is* intended to protect unenumerated rights, such as those contained in the Ninth Amendment. The argument is simple, yet compelling. The Constitution delineates two types of rights--fundamental rights and legal rights. A fundamental (or constitutional) right is one that is beyond the reach of the majority under normal circumstances, that is, absent a constitutional amendment revoking the right or an annulment of the right by the judiciary. A legal right, on the other hand, is one that can be rescinded by the majority through the normal legislative process. It does not make sense to leave the protection of fundamental rights to the legislature when that is exactly where the threat to those rights would likely originate. Stated differently, if, in legal disputes over unenumerated rights, one advocates judicial deference to the legislative branch, which means that the majority can void such rights, then the rights in question are, by definition, not fundamental, but merely legal.

If we adhere to the tenets of Bork's original intent jurisprudence, it follows that the Ninth Amendment, which states only that the individual has certain unenumerated fundamental rights against the state and the majority, is effectively meaningless. To assert that the Ninth Amendment grants merely legal rights would be tautologous, for all it would be saying under such a reading is that the legislature can legislate. And if the Ninth Amendment grants only legal rights, why does not the First? the Fifth? the Fourteenth? All of them were debated and then ratified. All of them, according to Article V of the Constitution, once they were ratified, became a part of the Constitution, and thus "the supreme law of the land" (Article VI). Hence, it is inconsistent that any other amendment to the Constitution can be deemed to grant fundamental rights, while the Ninth accords merely legal ones. But this inconsistency is necessary if we subscribe to original intentionalism.

This inconsistency, however, has nothing to do with the original intent of the framers, but rather with original intent jurisprudence. The cause is a *majoritarian bias* on Bork's part, one which, as I have shown, cannot be squared with the thinking of the framers. "Original intent" jurisprudence reflects *Bork's* vision of what democracy should be, and the judiciary's role in that largely majoritarian system. As such, the theory does precisely that which it purports to condemn: it displaces the intentions of the framers with views more amenable to the New Right's *Weltanschauung*.

From the critical analysis of Bork's theory, a single, though crucial, criterion derives:

6. A theory of constitutional interpretation should require judges to protect fundamental, though unenumerated rights against the state and the majority.

But is not the Ninth Amendment a veritable cornucopia of rights? Can not almost any right be "contained" in the Ninth Amendment? Of course! Still, the Ninth Amendment *was* ratified, and thus *is* fundamental law. Because of its vagueness, interpretivists insist that the courts should not "find" rights in the Ninth Amendment, but should defer to the legislative branch. This stance, however, amounts to punishing the courts for doing what they are authorized to do--protect fundamental rights. If anyone is to blame, it is Madison and company for ratifying such a broad amendment.

Furthermore, it is just as easy for one to maintain that the language of the Fourteenth Amendment is also vague, as is that of the Fourth and the Fifth. After all, what exactly is "due process of law"? "just compensation"? an "unreasonable search and seizure"? My point here is that all of this language requires *interpretation*, and inherent within that process is the possibility that there will be abuse. That is a risk that, for better or worse, our constitutional system takes, but guards against through such devices as the separation of powers and checks and balances.

* * * * * * * * * * * * *

Stanford Law School Professor John Hart Ely, like Robert Bork, is wary of the judiciary's role in a democratic society. In *Democracy and Distrust*, Ely sets out to construct a theory

of judicial review which avoids the problems that both interpretivists and noninterpretivists face. Each of these schools, Ely contends, is open to the charge that it is undemocratic. Interpretivism would hold present-day society captive to "the beliefs of people who have been dead for over a century." Noninterpretivism would have society ruled, ultimately, by an unelected tribunal, the Supreme Court.[71]

Ely describes his interpretational method as a "participation-oriented, representation-reinforcing approach to judicial review[.]"[72] He means that there are only two legitimate tasks that the judiciary can perform in a democratic society. First, the courts must see that every citizen is granted due process by the political system. Second, the courts must ensure that unpopular minorities are able to participate in "the process of representation" (e.g., voting, lobbying), and the courts must make that process "fair" by granting the proper weight to minority interests. He says the courts *may not*, however, make substantive value choices other than those clearly contained in the Constitution--which then, *presumably*, do not involve the subjective preferences of the judges, but rather those of "the people"--in deciding cases, for this is inconsistent with the "coherent theory of representative government" to which we in this country subscribe.[73] In other words, the courts may not, in the absence of a value choice in the Constitution, simply decide the outcome of a case to their liking. For Ely, "The tricky task [for constitutional scholars] has been and remains that of devising a way or ways of protecting minorities from majority tyranny that is not a flagrant contradiction of the principle of majority rule."[74]

Ely argues, for example, that laws which use racial classifications (e.g., grandfather clauses) can be overturned by the courts because such laws do not allow unpopular

minorities--in this case blacks--to participate fully in the political process (since they are denied the franchise), and thus does not allow them to influence legislative outcomes, which democracy demands.[75] Affirmative action programs, on the other hand, can be justified because they seek to undo the consequences of the denial by the majority of the representation of racial minorities.[76]

For Ely, *Roe v. Wade* is the paradigm case of what he is arguing against--"substantive due process."[77] He says that, in order to arrive at its decision in this case, the Supreme Court must have relied on values neither contained in, nor implied by, the Constitution; namely, their own values. The decision is undemocratic, because nine unelected judges have imposed their own personal beliefs about abortion on the entire nation. The Court was not neutral, was not concerned with due process. Rather, the Court simply selected the outcome it preferred, and thereby contravened the will of the majority (as reflected in the Texas statute prohibiting abortions).

Ely's conception of what constitutes a fair democratic process is the linchpin of his entire theory of judicial review. He claims that there is a *consensus* in this country about what a fair democratic process is.[78] That being the case, in the areas of free speech and a free press, for example, judges may make "noninterpretive" rulings. Such rulings, Ely says, are not really substantive in nature, but procedural, because they simply increase the fairness of the democratic process--a robust tolerance for the expression of diverse political opinions being "critical to the functioning of an open and effective democratic process."[79] The rulings are legitimate because there is (according to Ely) a consensus that such activities should be allowed; thus, judges are simply implementing society's values.[80]

In the absence of a consensus, however, judges exceed their authority when they make substantive value choices in deciding cases, because such decisions are inconsistent with the assumptions of a democratic society.[81] Is there a consensus in this country as to what constitutes "democracy" or a fair democratic process? If there is not, Ely's theory of judicial review collapses.[82] And surely there is *not*--at least to the extent that Ely's theory requires in order to justify "noninterpretive" court decisions in the areas of free speech and a free press. As Professor Geoffrey Hazard points out:

> [Most] of the people most of the time do not have a binding commitment to the open political process. I would surmise that at any given time an open political process is preferred only by a transient minority. All political parties, like all businesses, strive for monopoly; all interest groups try to down their opponents and very likely would seek to stifle them if not legally restrained; all branches and all agencies of government seek ascendancy when confronted by opposition; and summary justice for deviants is probably favored by a clear majority.[83]

Can it even be claimed, as Ely does, that democracy is, essentially, a matter of process and not of result? I doubt that such an assertion--that there is a consensus in this country that democracy is primarily a matter of process and not one of substance--can be sustained. However, as far as Ely's theory is concerned, it makes little difference. If democracy is the former, then it would make sense for the judiciary (unless authorized otherwise) to limit its review to matters of process. Even then Ely would have to show that one particular conception of a "fair democratic process" is held by the vast majority of people in this country. Absent this consensus, a court could not possibly evaluate the fairness of a particular process--after all, what (for most Americans) is fairness? In that case, if a

court is to evaluate a certain procedure in terms of fairness at all, it would have to do so based on its *own* conception of fairness. And this, it seems, is precisely what Ely argues against, the imposition of the substantive values of the courts on society. Thus, Ely's theory fails.

If democracy is primarily a matter of results, then Ely's theory again fails. He admits himself that there is no consensus in this country about what values (and therefore what results) are fundamental to a democratic system of government: "there is a growing literature that argues that in fact there is no consensus to be discovered (and to the extent that one may seem to exist, that is likely to reflect only the domination of some groups by others)."[84] In light of his contention, it is rather incredible that Ely would base his theory of judicial review on a notion of consensus. For if it is unlikely that consensus on fundamental values can be determined, then he should not suppose that a consensus on fair democratic procedure can be ascertained.

In the final analysis, Ely's "process"-based theory of judicial review reflects only *his* notion of what role courts should properly play in a democratic society--*not* society's view, if only because there is no consensus view. As such, Ely is guilty of that which he claims his theory attempts to avoid: "elites" imposing their values on society. In advocating a theory of judicial review, Ely, a member of the academic elite, is attempting to influence the manner in which judges interpret the Constitution. Since there is no real consensus as to what a "fair democratic process" is, it follows that some individual's (either Ely's or a judge's) conception thereof will guide judicial decision-making. According to Ely, this state of affairs is undemocratic.

Given the results of this examination of Ely's theory (and Bork's, for that matter), the following caveat by New York University Law Professor David Richards is apropos:

> Whenever a theorist denies the relevance of philosophy in doing law, one can be reasonably sure that the theory itself rests on a philosophy (hidden under such labels as popular sovereignty, value skepticism, neutral principles, representational fairness) which the author is unprepared to examine philosophically.[85]

Unfortunately, no criteria--not even a proscriptive one--can be derived from an examination of Ely's theory of judicial review.[86]

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In *Taking Rights Seriously*, Ronald Dworkin elaborates a noninterpretivist theory of constitutional interpretation. He writes that the central purpose of the book is to "define and defend a liberal theory of law."[87] Beginning with an examination of the fundamental assumptions of our scheme of government, he argues that one of the primary goals of our constitutional system is the protection of individual rights against the excesses of the majority. He then says that the amendments that comprise the Bill of Rights were designed to protect the fundamental rights of the individual. The courts would help to ensure that these rights were not violated.

The important provisions of the Bill of Rights are vague--*by design*, according to Dworkin. This vagueness is a source of dispute, for "even reasonable men of good will differ when they try to elaborate" exactly what these provisions mean.[88] To limit the meaning of

such a provision to the specific issues its authors had in mind when they drafted the provision, fundamentally misunderstands the intentions of the authors: vague constitutional provisions establish *concepts*, not *conceptions*.[89]

To illustrate this important distinction--upon which his theory of constitutional interpretation rests--Dworkin gives the following example. Suppose a father tells his children to treat others fairly. While he has in mind certain examples of what "fairness" means, he would not--indeed, could not--limit his meaning to those examples. The first reason Dworkin gives for this claim is that the father expects his children to apply his directions to situations which he did not and, in some cases, could not have thought about with respect to what would constitute fairness. The other reason is that the father allows for the possibility that in some instances he would be wrong about what fair conduct amounted to. If convinced of that by his children, he would change his mind.[90]

This new conception of the fairness of a particular situation is to be regarded as being *included in* the father's instructions, rather than as changing them. In short, Dworkin says, in instructing his children to treat others fairly, the father "meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness that I might have had in mind."[91] In other words, he is appealing to the concept of fairness, but gives no particular weight to his particular conceptions thereof.[92]

Analogously, the Constitution's "vague" provisions were meant to establish concepts, not conceptions. Thus, for example, even though the framers did not view the death penalty as constituting cruel and unusual punishment, the Supreme Court could still hold that it does, because the framers' conception of what comprised cruel and unusual punishment is

not the controlling factor; the concept of cruel and unusual punishment is. In making such a ruling, however, the Court has not "amended" the Constitution, because "the Court can enforce what the Constitution says only by making up its own mind about what is cruel."[93]

In drafting the "vague" provisions of the Bill of Rights, did the framers, as interpretivists such as Robert Bork claim, intend for their specific views (or conceptions) of what constitutes, for instance, freedom of speech, to be controlling? It is clear that they did not. First of all, the very fact that the important provisions of the Bill of Rights *are* vague suggests that they were meant to be taken only as guidelines or, to use Dworkin's phrase, concepts. (Looked at in this way, it is incorrect to call these provisions "vague," because "[i]f we take them as appeals to moral concepts they could not be made more precise by being more detailed."[94]) Had the framers intended for their particular views (i.e., their conceptions) to be controlling, they certainly would have used more descriptive language, and might have included specific examples of what they thought was protected under a particular clause.[95]

Second, the official record of the proceedings of the Philadelphia Convention was never published.[96] Surely the Convention delegates would have published such a record had they intended for their particular views on certain issues to be controlling. Of course the Bill of Rights, which is the main concern here, was not drafted during the Convention. But James Madison, the prime mover at the Convention, was also the primary author of the Bill of Rights. He kept his notes on the Convention proceedings secret until after his own death, and thus after the deaths of every other delegate, since he was the last to die.[97] Hence, the inference can be made that the drafters of the Bill of Rights did not intend for their

conceptions to limit judicial decision making. And as I have stated already, Madison himself said before Congress that the Convention delegates had no special claim to being "the oracular guide in expounding the Constitution."[98]

Finally, the historical evidence suggests that during the time of the framers many believed the "plain" meaning of a legal text should guide a judge's interpretation of it, rather than the reference to legislative history, which was unheard of.[99] This fact does not itself show that the framers did not wish for their specific intentions to govern judicial review. But, together with the above two arguments, it strongly suggests that the framers never entertained the notion that their "original intent" (or conceptions) should prevail. The foregoing analysis, then, provides us with a correctness criterion:

7. A theory of constitutional interpretation should understand the "vague" clauses of the Constitution to represent concepts (rather than conceptions)

This criterion validates the courts broad authority in deciding cases. It also allows different outcomes in a given case, because of the inherent vagueness of the concepts upon which a court is to base its decisions. (I should point out that Dworkin has never claimed that there was a demonstrably correct answer to many of the disputes over what fundamental rights we have under the Constitution.[100]) However likely that a judge's political outlook would come into play in relation to the other criteria I have selected, it is certainly the case that it will in this instance. Dworkin says as much, but his claim is that this is *required, is inevitable*: "If courts try to be faithful to the text of the Constitution, they will

for that very reason be forced to decide between competing conceptions of political morality."[101]

Dworkin's claim is not that judges, in deciding constitutional cases, are imposing their will on society. Rather, a judge is engaged in an attempt to discover *society's* will on a certain issue, as reflected by the constitutional system as a whole: the governmental structure, legal precedent, etc. To illustrate the judicial reasoning process this task involves, Dworkin introduces the fictional *Hercules*, a judge with first-rate legal skills, and assigns him a case dealing with the Establishment clause.[102] A law that gives free busing to parochial school children is challenged by concerned citizens. The issue is whether this law can be construed as the state's establishing a religious preference. The language of the Establishment clause does not offer a definitive answer, only a concept. Consequently, Hercules must develop a political theory which best "fits" the concept of the separation of church and state. In other words, he must determine which conception of that concept is most consistent with the constitutional system as a whole.

However, there may be more than one theory that warrants Hercules's consideration. Dworkin says one such theory, for instance, may posit that it is wrong for a legislature to pass any law that would result in serious social strain. The contested law would probably cause such tension because it would be viewed as favoring a particular religious faith (or faiths) over others. Dworkin says another theory may hold that there is a fundamental right to religious liberty under the Constitution. The establishment of a (state) church would violate this right. Given that both theories are relevant in the present instance, "Hercules must turn to the remaining constitutional rules and settled practices under these rules to see

which of these two theories provides a smoother fit with the constitutional scheme as a whole."[103]

If, for example, Hercules concludes that the theory of religious liberty has a better "fit," this judgment is not sufficient to decide the busing case. Questions about what constitutes religious liberty must still be addressed. Does religious liberty include the right not to have the taxes one pays used to help a particular religion survive? or does it include the right not to use taxes to favor one religion over another? If the former is the case, then the law in question is unconstitutional, because providing free busing to parochial school children, who would otherwise not be able to attend their school, helps to perpetuate the existence of the religion in question. If the latter notion of religious liberty is adopted, the busing law is constitutional: no other religious faiths are injured as a result of the state providing free busing to children of a particular faith.[104] Dworkin's view is that even the choice between the two competing conceptions of religious liberty may not be entirely clear, because "[t]he institutional structure of rules and practice may not be sufficiently detailed to rule out either . . . or to make one a plainly superior justification of that structure."[105]

When such a situation exists, according to Dworkin, Hercules must, *of necessity*, turn to political philosophy in order to decide the case. He must ask, which of the above conceptions is the more satisfactory elaboration of the idea of religious liberty?[106] Now, of course there is no one "correct" answer to this question, but rather several possible answers. This observation is consistent with Dworkin's distinction between concepts and conceptions, religious liberty being a concept, and the "answers" to the question "what is religious liberty?" being conceptions.

The question of the imposition of the personal values of the judges deciding the case is raised in this connection. Isn't the judge, in deciding which conception best "fits" a constitutional concept, really imposing his own values on society? After all, there is not *a* political philosophy (in any definitive sense), so a judge could choose the one which enables him to impose his values. Dworkin does not deny this possibility: "many of Hercules' decisions about legal rights depend upon judgments of political theory that might be made differently by different judges or by the public at large."[107] Nonetheless, he insists that the judge seeks (or, at any rate, should seek) to determine society's conception of the concept at issue.[108] Here the judge will have to rely on his own judgment of what constitutes "the political morality presupposed by the laws and institutions of the community," which helps shape society's conceptions.[109]

But that is inevitable. A judge determines the meaning of a constitutional provision only by interpreting it. One could argue that this is undemocratic. Since this nation is (basically) a democracy, judges should defer to the popular branches of government where substantive value choices are concerned, for this is more democratic. However, as I have already argued (see pp. 35-37), this argument misunderstands our governmental system. One of the primary goals of the governmental structure outlined in the Constitution is the protection of individual rights against the state and the majority. To contend that the courts should defer to the more popular branches on questions of constitutional rights is to hold that the individual has no fundamental rights against the majority. It is to maintain that our constitutional system provides only for legal rights, that is, rights that may be granted or revoked by the majority at any time. And surely that assertion cannot be squared with the

beliefs of the framers, nor with the "operationalization" of those beliefs; namely, the structure of our governmental system.

If the courts cannot determine what the provisions of the Constitution mean, this would have to apply very broadly. It would have to apply not only to such "vague" language as that contained in the Ninth Amendment, but also to the (slightly less "vague") language of, for example, the First Amendment. After all, what is "the freedom of speech"? The courts, in order to decide cases, *must* make such determinations. Since, as I have already argued, the framers did not intend for their specific intentions (e.g., as to what constitutes cruel and unusual punishment) to constrain the courts, it *must* be the case that the courts themselves were meant to make such judgments. And this is all that the courts could possibly do if, as Dworkin contends, the "vague" clauses establish only concepts. The courts must "give meaning" to these concepts in the form of the particular conceptions arrived at through their legal decisions.

Thus, taking into consideration the (above) implications of correctness criterion 7 (concepts v. conceptions), the following correctness criterion is appropriate:

8. A theory of constitutional interpretation must require judges to engage in "noninterpretive" analysis

Since the "vague" provisions of the Bill of Rights provide only concepts, the court must determine which rights best "fit" that concept in light of, for example, the governmental structure, the purposes of a constitution, previously decided cases, etc.[110] That

determination is "noninterpretive" only in the sense that the Constitution alone cannot provide guidance to a court sufficient to decide many constitutional cases. In engaging in "noninterpretive" decision making, the judge is adhering to the "original intent" of the framers (though certainly not "original intent" as theorists such as Robert Bork define the term).

This is a controversial claim, since the argument from democracy can again be raised. And no one can deny that, in one sense, such court power is undemocratic. But so is judicial review *per se*. Any act of an unelected tribunal overturning laws passed by elected officials is inherently undemocratic, whether the laws are overturned because they infringe upon freedom of speech or upon the Ninth Amendment's unenumerated rights.[111] Few theorists deny that there is a role for judicial review in our constitutional republic, since there are certain restrictions placed on what the majority can do. The dispute centers around whether the judiciary is *authorized* to make substantive value judgments other than those "contained" in the Constitution.

That question is answered by the arguments I have made above. If individuals have fundamental rights against the state and the majority, the courts must protect these rights; otherwise they are not fundamental, but merely legal.[112] Taken together with Dworkin's notion of concepts versus conceptions, that means the courts *must* make substantive value judgments in protecting--or, more appropriately, clarifying--the fundamental rights that individuals have against the majority. Thus, the process through which the courts clarify which rights individuals have is *not* undemocratic, at least in the sense that the courts are authorized to do so by the Constitution, and thus by "the people".

The framers, not "activist" courts, created the governmental structure in which the courts operate. Citizens are free to challenge the existing judicial order, through the representative institutions, by having a constitutional amendment passed curtailing the power of the judiciary. A challenge to the scope of judicial authority cannot legitimately come from appeals to nonconstitutionalized[113] notions of democracy--which is what Bork's "theory" of constitutional interpretation amounts to. Such efforts are nothing more than attempts to impose undemocratically one's values on society--precisely the evil allegedly abhorred.

In this chapter and the previous one I have generated a total of eight correctness criteria for evaluating theories of constitutional interpretation. In the next chapter I apply these criteria to three such theories, and thereby reach conclusions about interpretivism and noninterpretivism in general.

4

Applying the Correctness Criteria

In this chapter I will apply the eight correctness criteria I have derived to the three theories of constitutional interpretation I have examined in this essay. The relevance of this application is not limited to the correctness of these three theories compared to each other. The application has broader implications because Bork's and Dworkin's theories are representative of interpretivism and noninterpretivism (respectively) in important ways. A central tenet of interpretivism is that the judiciary should play a very limited role in a democratic society. Bork maintains this position. Two essential elements of noninterpretivist jurisprudence are the importance of the protection of fundamental individual rights by the courts and their use of moral philosophy in deciding constitutional cases. Dworkin's theory contains both of these components. For these reasons, the conclusions reached in the analysis below apply not just to those particular theories of constitutional interpretation in relation to one another, but also to interpretivism and noninterpretivism more generally.

* * * * * * * * * * * * *

A theory of constitutional interpretation should satisfy the following criteria. It should:

1. help to maintain a strong national government

2. facilitate the separation of powers
3. require the judiciary to play its proper role as a check on the excesses of the other two branches of government
4. consistent with the notion of limited government, prevent a court from exercising powers not granted to it under the Constitution
5. require courts to vigorously protect individual rights
6. require judges to protect fundamental, though unenumerated individual rights against the state and the majority
7. understand the "vague" clauses of the Constitution to represent concepts, not conceptions
8. require judges to engage in "noninterpretive" analysis in deciding cases.

I will apply the criteria to each theory in the order listed above. I begin with an evaluation of Robert Bork's original intent jurisprudence.

Original intent theory does promote a strong national government, at least with respect to Congress and the executive branch, since it does not allow the judicial protection of unenumerated rights and reserved powers referred to in the Ninth and Tenth Amendments, respectively. For the same reason, the judiciary would not be very strong under original intent theory. Since Bork's theory does not allow for noninterpretive judicial decisions, the courts are weaker in this respect as well. Such a state of affairs is appropriate in Bork's view, because the judiciary should play a very limited role in a democracy, which means it should have a very limited power of judicial review. There is a danger, however,

that original intent gives the government too strong a hand, again because of its narrow interpretation of individual rights and broad interpretation of governmental power.[114] Thus, we must qualify original intent theory's satisfying the first correctness criterion.

The jurisprudence of original intent does not do a very good job of facilitating the separation of powers. It assigns a very limited role to the judiciary in terms of protecting unenumerated rights. Therefore, the other two branches of government may make decisions which, under a theory such as Dworkin's, would be struck down, but under Bork's would be allowed to stand (e.g., the anti-contraception law in *Griswold v. Connecticut*).[115] In other words, original intent theory would allow the other two branches to invalidate part of the court's (in my view, constitutionally legitimate) judicial review power.

Likewise, original intent theory does not allow the judiciary to perform its proper function as a check on the other two branches of government. As Stephen Macedo, a Professor of Government at Harvard, makes clear:

> Conservative strict constructionists, like Bork, argue in effect that judges should enforce only explicit rights, rights plainly stated in the Constitution's text or very clearly implied in it. Legislators, on the other hand, may do anything that is not clearly forbidden by the Constitution's text and its clear implications. The stark divergence of standards can be justified only by a strong assumption that the overall purpose or point of the Constitution is to empower majoritarian institutions.[116]

As we have already seen (see pp. 33-37), Bork's jurisprudence does, indeed, suffer from a majoritarian bias. He assigns more power to the popular branches than can be justified under our constitutional system, which means that the judiciary cannot check some of the excesses of the popular branches.

Bork's jurisprudence does, however, clearly limit the judiciary to exercising powers granted it by the Constitution. At least with respect to the judiciary, original intent meets this correctness criterion. But, as we have seen, this restrictive view of judicial power entails a failure to satisfy several other criteria.

The implications of original intent theory for the vigorous protection of individual rights are not so clear. On the one hand, originalism would certainly allow for the protection of those individual rights which it recognizes. On that note, it meets the demands of the correctness criterion. On the other hand, Bork's theory of judicial review would not allow for the protection of unenumerated rights, because they are (in Bork's view) illegitimate if "discovered" by the courts but not acknowledged by the legislative branch. In this respect, it does not fulfill the criterion. Nonetheless, according to one understanding, original intent satisfies this correctness criterion; that is, it does do so in its own (very narrow) terms.

Of course original intent does *not* allow judges to protect fundamental, though unenumerated rights of the individual against the state and the majority. These "rights" are not, properly, rights according to Bork. They reflect the value judgments of an unelected tribunal; they are undemocratic. If, however, the judicial protection of such rights is legitimate, there is yet another strike against original intent.

Original intent jurisprudence also fails to meet criterion 7. Rather than viewing the Constitution's "vague" provisions as representing concepts, Bork views them as embodying the *specific* intentions of the framers, and nothing more. In Dworkin's terminology, Bork perceives the "vague" clauses as enacting the conceptions of the framers. Thus, for example, the death penalty is not and will never be prohibited under the cruel and unusual punishment provision of the Eighth Amendment.

Finally, it is obviously the case that Bork's jurisprudence does not satisfy correctness criterion 8: Bork is, he claims, absolutely opposed to noninterpretive court decisions. For Bork, such decisions are the ultimate in judicial illegitimacy.

How, then, has Bork's original intent jurisprudence fared? It meets three of the eight correctness criteria--one of them only minimally.

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Ely's theory does provide for a strong national government, for much the same reasons as does Bork's. That is, Ely's approach does not allow for the judicial protection of unenumerated rights and powers in (respectively) the Ninth and Tenth Amendments. Thus, the elective branches of the national government are, vis-a-vis the states and individuals (unpopular persons especially), stronger than they would be under noninterpretive jurisprudence.

For exactly the same reasons that apply to Bork's theory, Ely's does not facilitate the separation of powers very well. Since he does not believe that the courts can legitimately "discover" unenumerated rights, the popular branches would be all the more powerful under Ely's methodology.

With respect to criterion 3, there is no doubt that Ely would have justices forcefully protect the right to due process and the fair representation of the interests of minorities. Indeed, these are, according to Ely, the main roles of the judiciary. Thus, in discharging

these responsibilities the judiciary certainly will check the excesses of the popular branches. Those rights explicitly enumerated in the Constitution would also be protected. However, unenumerated rights, even those such as the right to privacy, which are viewed by many as very important, would receive no judicial protection at all. Nonetheless, Ely in some measure fulfills criterion 3, since his theory does protect the rights he sees as legitimate ones.

Ely's theory also prevents the courts from exercising powers not granted to them under the provisions of the Constitution. (However, like Bork's theory, Ely's does not allow the judiciary to exercise its full powers. But that affects its performance with respect to other criteria, not this one.)

With respect to the vigorous protection of individual rights, Ely's theory again gets a mixed review. On the one hand, he believes that the primary role of the judiciary is to ensure due process and the fair representation of the interests of minorities. Thus, both of these rights would receive energetic protection. On the other hand, since Ely views unenumerated rights as being illegitimate, these would not receive any protection at all. (But see criterion 6.) Arguably, then, Ely meets criterion 5.

Ely's approach to constitutional interpretation fails criterion 6 simply because Ely considers unenumerated fundamental rights to be illegitimate.

Ely does not view the "vague" clauses of the Constitution as representing concepts. After all, his theory of judicial review stresses that "the original Constitution was principally, indeed . . . overwhelmingly, dedicated to concerns of *process* and *structure* and not to the identification and preservation of specific substantive values."[117] Thus, his theory fails to satisfy criterion 7.

Finally, Ely's theory fails to meet criterion 8: he maintains that noninterpretive judicial decisions are inconsistent with democratic theory. Of course, his theory is, ultimately, noninterpretive. That is because he supposes there is a consensus about what constitutes democracy and a fair democratic process that simply does not exist. His arguments about the sort of free speech and press rights that the U.S. requires are just that--*his*: they do not represent what a majority of Americans believe. According to Ely, noninterpretivism is undemocratic, even though his own theory is, in the end, itself noninterpretive.

To summarize, Ely's theory of constitutional interpretation satisfies half of the eight correctness criteria.

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Ronald Dworkin's "noninterpretive" approach to constitutional interpretation could provide for a strong national government, particularly with respect to the judiciary, since his theory allows for the protection of unenumerated rights. If judges protect unenumerated rights, especially in relation to the Ninth and Tenth Amendments, the popular branches of government could be frustrated by court decisions that certain powers exercised by the national government were, in fact, reserved to the states. Because the national government has traditionally been granted generous powers under the "necessary and proper" clause, such a situation, though possible, is not very likely. Dworkin's theory, then, meets the first correctness criterion.

Dworkin's jurisprudence also meets the second criterion. The broad powers of the courts under his theory preclude the popular branches from exceeding their constitutional

powers. The judiciary could overstep its authority by becoming too "legislative." However, the popular branches have the tools to check the power of the judiciary: restricting its jurisdiction, constitutional amendment overturning a court decision (though this has rarely been done), the appointment process, not enforcing court decisions.

Dworkin's theory of constitutional interpretation requires the judiciary to check the excesses of the other two branches of government. If anything, Dworkin's theory makes the courts overly aggressive in checking the power of the popular branches, to the point where the courts usurp presidential and legislative powers. This possibility, however, does not affect whether or not the theory meets correctness criterion 3, which it surely does.

Dworkin's theory is consistent with the notion of limited government in preventing a court from exercising powers not granted to it under the Constitution. Dworkin allows the courts broad powers to protect fundamental (or constitutional) rights, even unenumerated ones. There is the potential for abuse in this. But judges would be limited to deciding cases based on the concepts that the "vague" clauses of the Constitution represent: the judges must formulate what they think are the best (given our governmental structure, precedent, etc.) conceptions of those concepts.

The claim that judges could abuse their power is one that could be made about any of the three theories of constitutional interpretation discussed in this essay and, indeed, any nontrivial theory. If a judge would abuse his office, *no* theory of constitutional interpretation could prevent him from doing so. Recognizing this, the framers gave the other two branches of government the powers they thought would enable them to check the excesses of the judicial branch. The judiciary, for instance, must rely on the other two branches to enforce the decisions it renders.[118]

Dworkin's theory most certainly requires the courts to vigorously protect individual rights. One of the central tenets of his jurisprudence, if not *the* central one, is that individuals have fundamental rights against the government and the majority.[119] Naturally, then, the courts should protect these rights.

Dworkin holds not only that individuals have fundamental rights against the state and the majority but also that some of those rights, for instance the ones mentioned in the Ninth Amendment, are unenumerated. Thus, Dworkin's theory satisfies correctness criterion 6.

And, of course, Dworkin understands the "vague" clauses of the Constitution to represent concepts, and not conceptions. After all, this correctness criterion was derived from my examination of Dworkin's "noninterpretive" jurisprudence.

Finally, Dworkin's theory requires judges to engage in "noninterpretive" analysis in deciding cases. This correctness criterion, like the one directly above, was derived from Dworkin's jurisprudence.

Dworkin's "noninterpretive" theory of constitutional interpretation meets all eight correctness criteria I have generated in this essay. Qualifications were made in relation to Dworkin's theory's satisfaction of two of the correctness criteria. Nonetheless, those two qualifications were hardly sufficient to prevent his theory from meeting the demands of the correctness criteria in question. *To the extent that the correctness criteria generated in this essay are valid, Dworkin's noninterpretive theory is the correct one, as is any theory which meets those criteria*.

Some of the implications of the courts' deciding cases under such a theory as Dworkin's are as follows. First, there will be no determinate answers to many legal questions,

especially ones involving unenumerated fundamental rights.[120] This fact, which Dworkin openly admits, is the case with *every* "serious" theory of constitutional interpretation. As Ely makes clear: "there simply does not exist a nontrivial constitutional theory that will not involve judgment calls."[121]

This is very likely the reason why theorists such as Bork wish to limit the substantive value judgments the courts can make to the specific intentions of the framers when they drafted the constitutional provision in question. But, as shown in Chapter 3, this claim is supported neither by the comments of the framers nor by the expansive language they used in the important (or "vague") provisions of the Constitution and the Bill of Rights.

Second, under Dworkin's theory of constitutional interpretation, the courts unquestionably would have expansive powers vis-a-vis the popular branches of government, including the power to "legislate." But, recall that the separation of powers is not and, indeed, cannot, be complete. If it were, how could one branch of government act as a check on the power of another?[122] Thus, the framers gave to the judiciary the power of judicial review which, however one views it, is the power to legislate, for what else is the court doing in overturning laws passed by the legislative branch?[123]

The controversy today is not *whether* but the *extent to which* the courts can invalidate laws. If, as suggested, the courts are authorized by the Constitution to engage in "noninterpretive" decision-making (see Chapter 3), critics of court power have no constitutional legs (as it were) upon which to stand. Whatever "blame" may be assigned for granting "too much" power to the courts lies with the framers and, ultimately, with "the people," who ratified that document. A complaint that such expansive court power is

undemocratic is most appropriately addressed by a constitutional amendment limiting the power of the judiciary. But jurisprudential revolution from above--which Bork's and Ely's theories amount to--is both anticonstitutional and undemocratic.

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I do not suggest that the eight correctness criteria derived in this essay are exhaustive. I have examined only three of the myriad theories of constitutional interpretation. Had I examined additional theories, I would doubtless have been able to generate more correctness criteria. Nonetheless, my conclusions are valid with respect to interpretivism and noninterpretivism, generally, for the following reasons. Bork's jurisprudence of original intent includes the claim that the judiciary should play a very limited role in the public affairs of a democratic society. This is the central premise of interpretivism. As I argued in Chapter 3, that premise is highly problematic; it is not consistent with the tenets of our constitutional system. Consequently, I doubt that *any* variety of interpretivism would avoid the pitfalls that defeat Bork's theory. (Ely's theory is similarly flawed, but he claims to be neither interpretivist nor noninterpretivist.) In other words, no conventional interpretivist theory will be able to generate correctness criteria which would enable one to choose interpretivism over noninterpretivism.

Therefore, I conclude that noninterpretivist jurisprudence, such as Dworkin's, is the correct theory of constitutional interpretation. If I am justified in making the assumptions that I have as to what "counts" in deciding the correctness of an approach to interpreting the

Constitution, then Dworkin's (and those like his) is the correct one. This conclusion seems inescapable.

But is it? That is, are the (sometimes implicit) assumptions upon which I have relied plausible? If they are not, I cannot maintain my conclusion. In the next chapter, I will show that, for various philosophical reasons, the assumptions I have made in this essay--and indeed, *all* the assumptions made by constitutional scholars in their quests for the "correct" theory of constitutional interpretation--ultimately rest on sand. So too, then, do all our theories.

5

The Problem of Arbitrariness

Each of the three theories of constitutional interpretation examined in this essay relies, to varying degrees and in slightly different ways, on the actions, beliefs, and intentions of the framers and the founding generation for its "correctness." But why is it that what the framers and their generation believed should be the controlling factor in defining the "correctness" of a theory of constitutional interpretation? (And I do not simply mean by "believed" their specific intentions about which rights were constitutionalized, as does, for instance, Robert Bork. Rather, I mean what they said and did, period.) Why not the value preferences of the judge? Why not the Law and Economics approach? Why not the idea of "human dignity"?

What makes a particular theory of constitutional interpretation "correct"? In the previous chapters of this essay, I assumed that a notion of *constitutional legitimacy* makes a certain theory (or type of theory; e.g., "noninterpretivism") "correct," while it excludes others. Based on that notion, I derived eight correctness criteria, applied them to three theories of constitutional interpretation, and concluded that a noninterpretivist theory like Dworkin's is correct.

I now call into question that notion of legitimacy, and thus the validity of the correctness criteria I generated. And if an acceptable idea of legitimacy cannot be arrived at, then there is *the Problem of Arbitrariness*. By this I mean the following. If there is no valid

concept of constitutional legitimacy, then how can one theory be chosen over another, given that no particular correctness criteria are any better, in a philosophical sense, than any others? After all, absent a notion of legitimacy, what is "correctness"? Now, I do not mean that one cannot make an argument for a particular theory, that is, that one cannot use a set of criteria to evaluate the desirability of a certain approach to interpreting the Constitution.

But so what? *Every* theory has its supporters, even if only a few; and surely an argument, of whatever quality, can be made in favor of every theory. The point is that the choice of one theory over another is *arbitrary*, arbitrary in the sense that there is no philosophically compelling reason to choose one theory over another. Thus, it is likely that one's own political and moral values will determine which theory one chooses. And if that is all the choice amounts to, then the notion of a "correct" theory of constitutional interpretation is well-nigh meaningless. One person's values and beliefs are not (in any definitive sense) "better" than any other person's.

If we are to resolve this dilemma, the question we must answer is this: how does one derive the criteria for choosing the criteria for choosing the "correct" theory of constitutional interpretation? It seems to me that the only "objective" way to do this, if in fact it can be done, is to rely on a notion of constitutional legitimacy. This I did in the previous chapters of this essay. I based the validity of the eight correctness criteria I generated on the fact that the framers drafted and had ratified a constitution which, the argument goes, legitimized a specific governmental structure, one in which certain individual rights were guaranteed, certain procedures must be followed in electing a president, etc.

The question is, then, is it the case that the Constitution is legitimate? That is, did the framers effect the drafting and ratification of the Constitution in the legitimate manner?

Well, there are, I think, two paradigms of legitimacy that apply here, the first being *procedural legitimacy.* This has to do with the idea of the rule of law. The second notion is *popular sovereignty*. Here, the argument goes, all that is required in order for the Constitution to be legitimate is that the founding generation consented to its adoption and that succeeding generations have confirmed that consent. I will examine each of these notions in turn.

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The concept of procedural legitimacy has to do with the established rules and procedures being followed by, for instance, a legislature, when considering the enactment of a bill into law. Thus, if a simple majority of legislators must vote in favor of a bill before it becomes law, and that number does vote for the bill, then the bill becomes a law. It has procedural legitimacy. The rule of law prevails. In the case of the ratification of the Constitution, then, all of the procedures established under the Articles of Confederation must have been adhered to by the framers, Congress, and the founding generation in order for the Constitution to have procedural legitimacy. As I will show, these procedures were not followed.

The Philadelphia Convention of 1787 was called by the Confederation Congress in order to correct the many weaknesses of the Articles of Confederation. The resolution authorizing the Convention reads as follows:

> Resolved that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia *for the sole and express purpose of revising the Articles of Confederation* and reporting to Congress and the several legislatures such alterations and provisions therein as shall, when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government and the preservation of the Union.[124]

Of course, the framers--mainly the federalists--decided to scrap the Articles in favor of a new constitution, one that would create a much stronger national government than the feeble one that existed under the Articles. In doing away with the Articles of Confederation, did the framers exceed their authority? That is, can one reasonably maintain that drafting a constitution which envisioned a national government with powers radically different from those exercised by the one under the Articles amounts to "revising the Articles of Confederation"?

I think not. Neither did several of the delegates to the Convention.[125] The word "revise" simply does not accurately express the extent to which the government the federalists proposed was different from the one that existed under the Articles. No, the federalists sought to do something much more drastic. As Merrill Jensen makes clear:

> The nationalist [i.e., federalist] leaders had no intention of merely revising the Articles of Confederation. They wanted to create a government free from subordination to and control by the state legislatures; one which, in contrast, would have the power to control both states and their citizens.[126]

"Furthermore," Jensen continues, "they proposed to abandon the internal structure of the government." Indeed they did. The federalists wanted a "balanced" government, that is, one

with separate legislative, executive, and judicial bodies. Under the Articles, by contrast, the Confederation Congress exercised all of those powers.

Madison himself admits that the delegates exceeded their authority and, in light of that admission, *still* says that the delegates should have drafted a new constitution:

> if they [the delegates] had exceeded their powers, they were not only *warranted*, but *required* as the confidential servants of their country by the circumstances in which they were placed to exercise the liberty which they assumed; and...finally, *if they had violated both their powers and their obligations in proposing a Constitution, this ought nevertheless to be embraced, if it be calculated to accomplish the views and happiness of the people of America.*[127]

Madison also says that "the means should be sacrificed to the end, rather than the end to the means."[128] This suggests that he did not have very much respect for the rule of law; that he would have violated any procedures necessary in order to effect the sort of governmental system he favored. And Hamilton, one of Madison's co-conspirators, held a similar, if more ruthless, attitude about the legal structure under the Articles of Confederation, which had, prior to the Philadelphia Convention, frustrated his proposal for a strong national government.[129]

Had the delegates to the Philadelphia Convention not proposed a new Constitution, the Articles of Confederation would arguably still have been scrapped at some point in the future. After all, the deficiency of the Articles was why the Convention was called. But the fact remains that the Constitution could not have come about when it did without the delegates having exceeded the authority granted to them by the Confederation Congress.

A possible view is that the constitution drafted at the Philadelphia Convention was

a referendum on the existing governmental structure. The delegates did submit the Constitution to the states for ratification. But, there are two major problems with this argument. First, the delegates themselves believed that the Confederation Congress had to give its imprimatur before the Convention could be called.[130] Many prominent political figures asked the Confederation Congress repeatedly to call a convention for the purpose of revising the Articles. Time and time again the Congress refused--until 1787.[131]

The second problem with the referendum argument is that, pursuant to Article XIII (of the Articles of Confederation), any proposal to amend the Articles must first be initiated and approved by Congress, and then submitted to the states for ratification.[132] Thus, Congress had to authorize the delegates to meet to revise the Articles. But even this delegation was questioned by some--even by John Jay, one of the authors of *The Federalist*--because it was not clear that Congress had the power to delegate such power.[133]

Yet another, unquestionable violation of the amendment process was committed by the delegates and, later, by the nation as a whole. First, on August 31, 1787, the Convention delegates agreed that the approval of nine of the thirteen states would be sufficient for ratification. This motion was *patently illegal*. Article XIII of the Articles of Confederation requires, first, congressional approval and, second, the approval of all thirteen states before any amendment can be made to the Articles.[134] Several of the delegates objected to the inclusion of this proposal in the Constitution (Article VII), but it was, nonetheless, approved.[135]

At any rate, the delegates submitted the Constitution to Congress, and requested that Congress immediately submit it to the states for ratification. On September 28, Congress did agree to submit the Constitution to the states for ratification--complete with its requirement

of only nine states for ratification. In this respect, the Congress also acted unconstitutionally, because its membership knowingly submitted a document to the states for ratification by nine of them, even though Article XIII clearly requires *unanimous* state ratification.

But the illegality did not end there. Each of the eleven states that ratified the Constitution also illegally accepted the nine-state ratification requirement.[136] George Washington was elected president, and inaugurated on April 30, 1789--still with only eleven states having ratified the Constitution. Thus, the new government came into existence *without* the unanimous ratification of the Constitution by all of the thirteen states. (North Carolina ratified the Constitution on November 21, 1989, and Rhode Island on May 29, 1790.)[137]

Clearly, then, not only did the delegates to the Philadelphia Convention violate the rule of law; the legislatures of eleven of the thirteen states did as well. (North Carolina and Rhode Island did not want to ratify, but reluctantly did so out of the fear of being excluded from the new union.) They simply did not care about the amendment process under the Articles.[138] Rather, they wanted an effective national government, and did whatever was necessary to achieve it. But their zealousness does not erase the fact that they violated certain procedures in order to achieve their goal. In terms of procedural legitimacy, the Constitution is conclusively illegitimate. Looked at in this way, the Constitution *has no legal force*. Thus, the rule of law paradigm is lost.

The notion of procedural legitimacy does not overcome the Problem of Arbitrariness. In order to entertain the idea of a "correct" theory of constitutional interpretation, one must have correctness criteria by which to evaluate the theory in question. The validity of any

correctness criteria *must* rest on constitutional legitimacy, and the Constitution has no legitimacy in procedural terms. Consequently, no theory of constitutional interpretation is any more "correct" than any other, because "correct" is utterly void of meaning.[139] No matter how elaborate and appealing the arguments in favor of a particular theory are, that theory can no more be said to be "correct" than can the one supported by the most pathetic of arguments.[140] Which is not to say that a theory wrapped in fancy rhetorical dress will not be chosen over the more poorly argued theories. But however attractive the argument for a particular theory is, to call it "correct" is unjustified, because one's choice of correctness criteria, however well-reasoned, must perforce be arbitrary.

Without a basis for the Constitution's legitimacy, the Problem of Arbitrariness will prevail, leaving us with a serious constitutional dilemma, if only at the theoretical level. But that is, after all, the topic of this essay--jurisprudence, the *philosophy* of law. If procedural legitimacy fails to meet the challenge posed by the Problem of Arbitrariness, the only other standard by which to evaluate the legitimacy of the Constitution is popular sovereignty. I see no other alternatives for resolving the Problem of Arbitrariness.

In a general sense, popular sovereignty means that ultimate political authority lies with "the people," not with their elected representatives.[141] If we interpret constitutional legitimacy in terms of popular sovereignty, the Problem of Arbitrariness appears at first to be solved: the Constitution is legitimate because "the people" ratified it.[142] That is all that is required. "The people" expressed their approval for the document, so it became "the supreme law of the land."

But serious difficulties arise from this notion of constitutional legitimacy, *given the manner in which the Constitution was ratified*.[143] The Convention delegates, in drafting a

new constitution with a nine-state ratification requirement, and "the people," in agreeing to this illegality, in effect said, "To hell with process." It is through the requirement that governmental actions follow a certain process that limits are placed on what the majority can and cannot legally do to unpopular individuals. However, with the defenestration of process, as it were, the Bill of Rights becomes meaningless. Why? Because if popular sovereignty is the legitimating factor (with respect to constitutional legitimacy), no (theoretical) restraints on the majority can exist: the law is what "the people" say it is, notwithstanding process, or anything else, for that matter.

One objection to the above analysis is that, in ratifying the Constitution, "the people" surrendered some of their rights; that is, they agreed to limit their power by following certain procedures and observing the Constitution as fundamental law. Thus, the Bill of Rights does protect fundamental individual rights against the state and the majority, because that is part of what "the people" consented to by ratifying the Constitution. But this argument is unpersuasive because *the same argument would have to apply with respect to the Articles of Confederation*. And in that case, the Constitution is still illegitimate (and thus we are still left with the Problem of Arbitrariness), because the amendment procedure laid down in the Articles--which were also agreed to by "the people"--was, nevertheless, violated by them. The Constitution is still illegitimate, that is, unless one maintains that it is not illegitimate to violate established procedures and, more broadly, constitutional language (through which, after all, procedures are expressed).

If that is the case, then there is a seemingly insurmountable problem one must address. If process does not have to be followed, what does it mean, for example, for a

person to be denied due process when, by definition, *no* process is due? What does it mean to say that a law was enacted by Congress when no particular legislative process has to be followed? And, as relates most directly to our concerns here, how can one claim there is a "correct" theory of constitutional interpretation that judges must follow in deciding cases when no single set of correctness criteria is any more valid than any other? The answer, of course, is that one cannot make such a claim (and be taken seriously!), because if no particular theory must be utilized by a judge, it follows that his choice of a theory of constitutional interpretation is arbitrary: the judge may "legitimately" use whichever criteria he pleases to select a theory with which to decide cases. Again, we are left with the Problem of Arbitrariness; and the popular sovereignty paradigm is lost.

In fact, it does not even make sense to speak of "constitutional legitimacy" if no procedures (and no constitutional language in general) have to be followed, because, at least at the theoretical level, "anything goes." To entertain a notion of legitimacy which allows illegitimacy amounts to allowing a contradiction in logic. Anything can be shown to be true if, as in this example, a contradiction is allowed as one of an argument's premises. So, unless there is a way to remove this contradiction--and there is not--I must conclude that the idea of a "correct" theory of constitutional interpretation is a chimera and, even worse, a rhetorical device used to veil subjective value preferences.

6

Conclusion

I began my essay by asking what has to be the most important question in American jurisprudence: What is the "correct" approach to interpreting the Constitution? In an attempt to answer that question, I sought to generate several correctness criteria for evaluating theories of constitutional interpretation. In order to derive those criteria I had to make certain assumptions about what "matters" in terms of helping to define "correctness." I had to suppose, in other words, "that certain principles (e.g., the separation of powers, limited government) underlie our constitutional system, *and* that these are relevant to what constitutes the 'correct' method of constitutional interpretation."[144]

Under those assumptions, I was able to derive eight constitutional "correctness" criteria. An application of these showed that a noninterpretivist theory, such as Ronald Dworkin's, is the "correct" theory of constitutional interpretation. Robert Bork's original intent jurisprudence--and, in so far as it suffers from the same problems, interpretivism in general--and John Hart Ely's theory were both shown to be not only "incorrect," but also self-contradictory. Both of those theories, while claiming to abhor the injection of nonconstitutionalized value preferences into the judicial review process, did exactly that.

But the fact of the matter is that, upon closer examination, my assumptions as to which factors "count" in terms of deciding how to "correctly" interpret the Constitution were, in the final analysis, untenable. They cannot be made because they rest on the legitimacy of

the Constitution, which, as I have shown, is not at all legitimate--neither when viewed through the lens of the rule of law paradigm nor through that of popular sovereignty. Since these two paradigms have been lost--overthrown by the Problem of Arbitrariness--I cannot help but conclude that any and every theory of constitutional interpretation that claims to be "correct" actually rests on sand.

It is, therefore, meaningless to speak of a "correct" theory of constitutional interpretation. All theory's are equally valid. Philosophically, the choice is arbitrary: any theory is as good as any other. But any theory is *not* as good as another in terms of producing the court decisions one prefers. Rather, the theory one prefers most likely depends on one's political preferences, which are, ultimately, arbitrary criteria.

Nevertheless, the representation of certain political preferences on the courts, especially the Supreme Court, is of crucial importance, because those preferences guide a judge's decision making. Presidents and senators have long appreciated this fact. That is why the confirmation hearings of some Supreme Court nominees--most recently Robert Bork's--are so controversial. Politicians recognize that the confirmation of judge's who share their political outlook is often an opportunity to shape public policy significantly through the decisions of an "impartial," extremely powerful Supreme Court.

Notes

1. Edwin Meese, address before the District of Columbia chapter of the Federalist Society Lawyers Division (November 15, 1985).

2. William J. Brennan, Jr., "The Constitution of the United States: Contemporary Ratification," an address to the Text and Teaching Symposium at Georgetown University (October 12, 1985).

3. Erwin Chemerinsky, *Interpreting the Constitution* (New York: Praeger Publishers, 1987), p. ix.

4. See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), chap. 1; Thomas C. Grey, "Do We Have an Unwritten Constitution?" 27 *Stanford Law Review* 703 (1975).

5. Ely, p. 1.

6. This claim, as we shall see, is flawed, in at least three respects. First, it is often the case that the wishes of "the majority" are not reflected in legislation; rather, the desires of special-interest groups are. Second, while federal judges are not directly elected, they are, for better or worse, nominated by the president and either confirmed ("elected") or rejected by the U.S. Senate. Third, and most important, the question is not whether judges sometimes substitute their values for those of the majority, for undoubtedly they do. The question is, are they *authorized* to do so. I will provide an answer to this question in Chapter 3.

7. The Ninth Amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

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

9. Ely, p. 13.

10. Grey, p. 708.

11. See my pp. 35-37 for the distinction I make between "fundamental" rights and "legal" rights, which clarifies the matter being discussed here.

12. Richard A. Posner, "What Am I? A Potted Plant?" *The New Republic*, 28 September 1987, p. 24.

13. See Robert H. Bork, "Neutral Principles and Some First Amendment Problems," 47 *Indiana Law Journal* 1 (1971): 1-11.

14. See Chemerinsky, chap. 4.

15. Bork, p. 6.

16. See Madison's *The Federalist No. 10*; David A. Richards, *Toleration and the Constitution* (Oxford: Oxford University Press, Inc., 1986), pp. 4-19. The main point here is not whether the beliefs of the framers matter; rather, it is that the interpretivists claim that they (the beliefs) do.

17. See Merrill Jensen, *The Making of the American Constitution* (Huntington, NY: Robert E. Krieger Publishing Company, 1964), pp. 29-30; Richards, pp. 38-41.

18. Ely, p. vii.

19. Richard A. Epstein, Foreword in Stephen Macedo, *The New Right v. the Constitution* (Washington, D.C.: The Cato Institute, 1987), pp. xiv-xv.

20. Of course those assumptions are not philosophically unassailable. For instance, by what *right* does the majority rule? I do not pretend to be able to answer that question--indeed, I doubt that it has an answer. Nevertheless, I must make the assumptions I do about to the "relevance" of the ratification of the Constitution (and of majority rule) to the determination of the "correct" theory of constitutional interpretation if my analysis is to proceed. Absent those assumptions, it does not make sense to speak of a correct theory, because that depends on correctness criteria--and one may choose any (if the above assumptions are not made).

21. See my p. 5.

22. See Chemerinsky, p. 50. There was an official journal of the proceedings, but it is rather incomplete, and contains several mistakes. Madison's notes are considered to be the fullest account of what went on during the Convention, but the veracity of his notes has been questioned. At any rate, in Chapter 2 I shall discuss these matters in greater detail.

23. Ely, p. 87.

24. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

25. According to Bernard Schwartz, "Now that the Bush court appointments are starting to follow the Reagan pattern, the views of the New Right jurists may soon become accepted judicial doctrine." *The New Right and the Constitution: Turning Back the Legal Clock* (Boston: Northeastern University Press, 1990), p. ix.

26. Ely, p. 181.

27. See Brennan, pp. 9-16.

28. Winton U. Solberg, ed., *The Federal Convention and the Formation of the Union of the American States* (New York: The Liberal Arts Press, Inc., 1958), pp. lxxiii-lxxxvii.

29. Sol Bloom, ed., *History of the Formation of the Union under the Constitution* (Washington, D.C.: United States Constitution Sesquicentennial Commission, 1948), pp. 11-13.

30. Jensen, p. 34.

31. Solberg, p. 68.

32. See Jeffrey Shaman, "The Constitution, the Supreme Court, and Creativity," 9 *Hastings Constitutional Law Quarterly* 257, 267 (1982).

33. See William Crosskey, *Politics and the Constitution in the History of the United States* (Chicago: University of Chicago Press, 1953), pp. 1008-1028.

34. See James Madison, *Notes of Debates in the Federal Convention of 1787* (Athens, OH: Ohio University Press, 1966). In this book, which is 659 pages in length, comments of substance pertaining to the judiciary comprise less than 20 pages.

35. See Everett Carll Ladd, *The American Polity: The People and Their Government*, 2nd ed., (New York: W.W. Norton & Company, Inc., 1987), p. 81.

36. See Bloom, p. 27. Actually, North Carolina and Rhode Island did not ratify the Constitution until *after* the new government was in operation. Further, Rhode Island never even held a convention. I shall return to this point, which is of substantial significance, in Chapter 5.

37. 4 Wheaton 316; 4 L. Ed. 579.

38. Among them, James Harrington, David Hume, Rousseau (if only negatively), Blackstone, and of course Locke and Montesquieu. See Solberg, pp. xxvii-xlvi.

39. See Madison's *The Federalist No. 47*: "'When the legislative and executive powers are united in the same person or body,' says he [Montesquieu], 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner."

40. 454 U.S. 812 (1983).

41. See Ladd, p. 161.

42. See Solberg, p. xxxvi: "Besides his direct influence, Locke contributed indirectly to America by helping to shape the thought of Montesquieu, Hume, Rousseau, and Blackstone."

43. This concept is, of course, very closely related to the separation of powers doctrine and the idea of a system of checks and balances, the latter two being the means to limited government. However, the notion of limited government provides a *different* correctness criterion than do the other two principles.

44. Locke, as cited in William Ebenstein, *Great Political Thinkers: Plato to the Present*, 4th edition, (New York: Holt, Rinehart and Winston, 1969), p. 397.

45. See Hamilton's *The Federalist No. 22* and Madison's *The Federalist No. 39*.

46. Ebenstein, p. 397.

47. See Herbert J. Storing, *What the Anti-Federalists Were For* (Chicago: The University of Chicago Press, 1981), p. 65.

48. Ely, p. 87.

49. Bork, p. 1.

50. Of course, a principle can, in truth, be neither "neutral" nor "biased," at least in any meaningful sense. See Arthur Miller and Ronald F. Howell, "The Myth of Neutrality in Constitutional Adjudication." 27 *University of Chicago Law Review* 661 (1960): 662.

51. Bork, p. 2.

52. Bork, p. 3 and p. 6.

53. Herbert Wechsler, as cited in Bork, p. 1.

54. I myself made reference to "the framers" in Chapter 2 in connection with my generation of correctness criteria without really defining that phrase. Thus, on first blush, it may appear that I am open to the same criticism that I now make of Bork. Not so. True, I use "the framers" generically, as does Bork, apparently. But I do so only to make very general, noncontroversial observations about the principles (e.g. checks and balances) which underlie our government. Bork does something vastly different than this, for his jurisprudence requires a judge to know with some precision what the specific intent of the framers was in drafting the provisions of the Constitution. My use of "the framers" does not require the degree of knowledge of what those who ratified the Constitution thought that Bork's does, and thus does not require me to say exactly whom the framers were.

55. Robert Bork, "The Case Against Political Judging," *The National Review* (December 8, 1989): 23.

56. See Schwartz, p. 9.

57. Schwartz, p. 9: "[T]he materials on ratification [in the state conventions] are so skimpy that those on the Philadelphia Convention or the First Congress seem a veritable cornucopia by comparison."

58. See Richards, pp. 42-44.

59. Justice Robert Jackson, opinion in *West Virginia Board of Education v. Barnette* (1943) 319 U.S. 639.

60. I do not mean to suggest here that what the framers intended is necessarily a factor in whether we should follow that intent. The point is that Bork asserts that we should follow the intent of the framers.

61. Macedo, p. 13.

62. *National Mutual Insurance Company v. Tidewater Transfer Company* 337 U.S. 582, 646 (1949) (Frankfurter, dissenting).

63. And even this seemingly obvious language is slightly unclear: must presidents be at least thirty-five at the time they are elected or by the time (having won the election) they are inaugurated?

64. Paul Brest, "The Misconceived Quest for the Original Understanding," 60 *Boston University Law Review* (1980): 216.

65. Madison, as quoted in Irving Kaufmann, "What Did the Founding Fathers Intend?" *The New York Times*, February 23, 1986.

66. See Hamilton's *The Federalist No. 78*: "the judiciary is beyond comparison the weakest of the three departments of power.
"...The celebrated Montesquieu, speaking of them, says:'Of the three powers above mentioned, the JUDICIARY is next to nothing.'"

67. See Gordon Wood, *The Creation of the American Republic: 1776-1787* (New York: W.W. Norton & Company, 1969).

68. Bork, p. 6.

69. Macedo, p. 27; and Brennan, pp. 4-5: "A position that upholds constitutional claims only if they were within the specific contemplation of the Framers in effect establishes a presumption of resolving textual ambiguities against the claim of constitutional right. It is far from clear what justifies such a presumption against claims of right. Nothing intrinsic in the nature of interpretation--if there is such a thing as the 'nature' of interpretation--commands such a passive approach to ambiguity. *This is a choice no less political than any other; it expresses antipathy to claims of the minority to rights against the majority.*" (Italics mine.)

70. Madison, as quoted in Macedo, p. 29.

71. Ely, p. vii.

72. Ely, p. 87.

73. Ely, p. 74.

74. Ely, pp. 7-8.

75. See Ely, pp. 135-170.

76. See Ely, pp. 170-72.

77. Ely, p. 18: "'substantive due process' is a contradiction in terms--sort of like 'green pastel redness.'"

278. Ely, p. 105: "Virtually everyone agrees that the courts should be heavily involved in reviewing impediments to free speech, publication, and political association."

79. Ely, p. 105.

80. Ely says (p. 117) the courts, rather than the legislature, should enforce these societal norms since the former cannot be trusted to do so because its members "have an obvious vested interest in the status quo."

81. I have shown in my analysis of original intent jurisprudence that this claim is incorrect--at least with respect to what the framers believed. Ely, however, contends that contemporary society's conception of what constitutes democratic government should prevail; thus he avoids the pitfall which frustrates Bork's analysis.

82. See Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven: Yale University Press, 1982), pp. 77-90.

83. Geoffrey Hazard, "The Supreme Court as a Legislature," 64 *Cornell Law Review* 1 (1978): 26-27.

84. Ely, p. 63. More generally, see Ely, ch. 3.

85. Richards, p. 18.

86. At first, I thought the following criterion was derivable and useful: a theory of constitutional interpretation should *not* limit the judiciary's primary role in our political system to ensuring due process and the fair representation of the interests of minorities. After further reflection, however, I saw that this criterion would be rather "clumsy," first because Ely also says that judges can protect substantive rights clearly stated or implicit in the Constitution; second, because other criteria, including criterion 6, "engulf" this one, because they allow judges to make noninterpretive decisions and protect unenumerated rights.
At any rate, though, in terms of analysis nothing would be gained by including this criterion (other than another strike against Ely's theory). Thus, I did not include it.

87. Dworkin, p. vii.

88. Dworkin, p. 133.

89. Dworkin, pp. 134-36.

90. Dworkin, pp. 134-35.

91. Dworkin, p. 134 (original italics).

92. Dworkin, p. 135: "The difference is a difference not just in the *detail* of the instructions given but in the *kind* of instructions given. When I appeal to the concept of fairness I appeal to what fairness means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter. When I appeal to fairness I pose a moral issue; when I lay down my conception of fairness I try to answer it."

93. Dworkin, p. 136.

94. Dworkin, p. 136.

95. See Chemerinsky, p. 62; Macedo, p. 14; Dworkin, p. 136.

96. Macedo, p. 13. See also my p. 32.

97. See Solberg, p. 397.

98. Irving Kaufmann, "What Did the Founding Fathers Intend?" *The New York Times*, February 23, 1986.

99. See Brest, p. 216. See also my pp. 32-33.

100. Dworkin, p. xiv: "It is no part of my theory, for example, that any mechanical procedure exists for demonstrating what political rights . . . a particular individual has. On the contrary, the essays emphasize that there are hard cases, both in politics and at law, in which reasonable lawyers will disagree about rights, and neither will have any argument that must necessarily convince the other."

101. Dworkin, p. 136.

102. See Dworkin, pp. 105-130.

103. Dworkin, p. 106.

104. Dworkin, p. 107.

105. Dworkin, p. 107.

106. Dworkin, p. 107.

107. Dworkin, p. 123.

108. Dworkin, p. 126: "Hercules' theory of adjudication at no point provides for any choice between his own political convictions and those he takes to be the political convictions of the community at large. On the contrary, his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community."

109. Dworkin, p. 126.

110. See Dworkin, pp. 123-30.

111. See Chemerinsky, p. 12: "If democracy requires that values be chosen by electorally accountable officials, judicial review by unelected judges cannot be reconciled with a purely procedural definition of democracy. Either the commitment to majority rule or the commitment to judicial limits on majoritarian decisions must be sacrificed."

112. Of course, the courts must protect (what I call) legal rights as well as fundamental ones. The point is that, while the courts cannot (legitimately) prevent the legislature from revoking legal rights through a simple majority vote, they can prevent the majority from voiding fundamental rights (through the normal legislative process). See also my pp. 35-37.

113. By "nonconstitutionalized" I mean inconsistent with the governmental structure laid down by the Constitution.

114. See Macedo, p. 27.

115. See Bork's "Neutral Principles and Some First Amendment Problems."

116. Macedo, p. 27.

117. Ely, p. 92. (My italics.)

118. John Hart Ely has said that the framers did not foresee the potential power that the judiciary would yield under our governmental system. He says that the checks on judicial power provided for in the Constitution have proven to be wholly inadequate (Ely, pp. 44-48). That claim is fairly accurate if one subscribes to a theory of constitutional interpretation, such as Ely's or Bork's, which sees the judiciary as playing a very limited role in a democratic system. The claim is not as valid, however, if one accepts Dworkin's jurisprudence.

119. See Dworkin, pp. 138-39.

120. See note 100.

121. Ely, p. 67.

122. See Madison's *The Federalist No. 47* and *No. 48*: ". . .unless these departments [i.e., the three branches of government] be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim [i.e., the separation of powers] requires, as essential to a free government, *can never in practice be duly maintained.*" (My italics.)

123. Of course, some theorists argue that Chief Justice Marshall's reasoning in *Marbury v. Madison (1803)* is defective, and that he usurped the power of judicial review for the courts. See, for example, Christopher Wolfe, *The Rise of Modern Judicial Review* (New York: Basic Books, Inc., 1986), ch. 3; William Van Alstyne, "A Critical Guide to Marbury v. Madison," *Duke Law Journal* (1969): 1; and Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill, 1962), ch. 1.

124. Solberg, ed., p. 64. (My italics.)

125. Storing, p. 7: "The Anti-Federalists often objected even to entering into the debate on the Constitution because of legal irregularities in the proceedings of the Philadelphia Convention. They argued that that Convention had been authorized 'for the sole and express purpose of revising the Articles of Confederation,' and had no right to propose any radical change in the government of the Union."

126. Jensen, p. 36.

127. *The Federalist No. 40.*

128. *The Federalist No. 40.*

129. Jensen, p. 33: "in 1780 Hamilton suggested a convention to create a powerful central government and to adopt one *without reference to Congress, the legislature, or the people, and to use the army to put it into effect if need be*." (My italics.)

130. See *The Federalist No. 40.*

131. See Jensen, pp. 30-35.

132. See Bloom, p. 538.

133. See Jensen, pp. 33-34.

134. Article XIII reads: "Every state shall abide by the determinations of the united states in congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this confederation shall be inviolably observed by every state, and the union shall be perpetual; *nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state*." (My italics.)

135. See Storing, p. 7.

136. I say only eleven states ratified the Constitution because, as a matter of fact, the government outlined in the Constitution came into existence before two states reluctantly ratified the document.

137. See Bloom, p. 27.

138. See note 129.

139. Please understand that I am *not* being nihilistic here: I am not asserting that the term "correct" has no meaning. Rather, my point is that that term has meaning only in terms of a notion of constitutional legitimacy, which, at least in procedural (or rule of law) terms, simply does not exist. Thus, without the referent of constitutional legitimacy to define "correct(ness)," the word has no meaning.

140. Strictly speaking, if there is no constitutional legitimacy, no argument for a "correct" theory of constitutional interpretation can be any better or any worse than any other. They are all equally absurd, because they refer to a (contextually) meaningless term; namely, "correctness."

141. I think I am correct in saying that the intension of this "definition" of popular sovereignty is sufficient for my purposes here. I say that because I doubt that any more elaborate definition would do any better than this one in terms of solving the Problem of Arbitrariness.

142. Of course, it is really disingenuous to say that "the people" ratified the Constitution. Only white, property-owning males (with few exceptions) could vote during the founding era. Although there are no exact figures, it is estimated that not more than one fourth of the adult male population participated in the selection of the delegates to the state ratifying conventions (Jensen, p. 140).

143. Take care to keep this qualification in mind. I do not mean to suggest that the will of the majority cannot be constrained under any scheme of popular sovereignty within a constitutional system.

144. See my pp. 10-11 and p. 16-17.

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