1986

The Right Questions in the Creation of Constitutional Meaning

Stephen L. Carter
Yale Law School

Follow this and additional works at: https://digitalcommons.law.yale.edu/fss_papers

Part of the Law Commons

Recommended Citation
https://digitalcommons.law.yale.edu/fss_papers/2229

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
THE RIGHT QUESTIONS IN THE CREATION OF CONSTITUTIONAL MEANING

STEPHEN L. CARTER

In the peculiar rhetoric that is rapidly growing ubiquitous, constitutional theorists and anti-theorists seem to thrive on accusing one another of asking and answering the wrong questions.1 Apparently only a limited number of items are permitted on the theoretical agenda, and those who search beyond its limits must be quickly, even angrily, struck aside. Those denounced for the shape of their agendas may be condemned as nihilists or normal scientists, as extremist or irrelevant, as unsophisticated or incoherent. Indeed, critical analysis without an accompanying denunciation is an art form that barely has a place any longer in legal scholarship. In the realm of constitutional theory the problem is particularly acute, and perhaps made worse because so much is now being written in a field that not so long ago was near to being written off.

Ronald Dworkin may be right to suggest that far too much talent is squandered on efforts to legitimate some “objective” form of judicial review.2 I have no idea. I have never tried to do it—not, at least, through sketching some grand theory to explain and justify the general trends in the work of our constitutional courts. If Erwin Chemerinsky believes that I have,3 then I fear that I have not written as clearly as the subject matter demands. For in his “reply” to my recent modest foray into the muddy and treacherous thicket of constitutional theory, he concludes that I have failed “because all who try to develop a value free system of judicial review

† © 1986 by Stephen L. Carter
* Professor of Law, Yale University. Enola Aird, Akhil Amar, and Owen Fiss offered useful comments on earlier drafts of this rejoinder.
1 To trace but one odyssey, see A. BICKEL, THE LEAST DANGEROUS BRANCH 102 (1962) (“[T]o seek in historical materials relevant to the framing of the Constitution, or in the language of the Constitution itself, specific answers to specific present problems is to ask the wrong questions . . . .”); J. ELY, DEMOCRACY AND DISTRUST 72 (1980) (criticizing Bickel) (“No answer is what the wrong question begets.’’); and Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 YALE L.J. 1037, 1062 (1080) (criticizing Ely) (“Unfortunately, no answer is also what the right question begets.’’).
inevitably must fail." Maybe they must. Were I among them, I would no doubt consider solving the problem to be the definitive mission of my intellectual enterprise. But I'm not and I don't.

My mission in *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*—the essay with which Professor Chemerinsky so earnestly disagrees—was quite different from and significantly more modest than the one he attributes to me. My concern was not with the justification for judicial review, but rather with the literature seeking to defend it against what I called the "delegitimizing" assault, the attack contending that judicial review as practiced in the United States is inconsistent with the liberal democratic theory on which the nation's politics are premised. I did not argue that the delegitimizers are wrong—I don't have the background in fashionable European literary theory to do that—but I did contend that those who defend against the assault by trying to create grand theories are likely to fail. On this proposition, Professor Chemerinsky and I apparently agree.

We do not agree, however, on my further ambition. I had thought that I made it clear on the third page of my essay: "I am not so bold as to claim that my approach resolves the problem raised by the delegitimizing critique of conventional constitutional theory, but the approach does, I think, suggest some avenues that conventional theorists who desire to repulse the assault ought to travel." My own conception of the essay was that I did no more than set out a research project. But judging from Professor Chemerinsky's response, as well as some of the very interesting correspondence that I have received, perhaps I set it out poorly. So rather than spend time and space playing quote-for-quote with my essay and Professor Chemerinsky's response, I will try in a somewhat different fashion to say what I thought I was saying the first time.

I. OUR POLITICAL CONSTITUTION

My thesis, a bit over-simplified, is this: The effort to meld extra-constitutitional review with liberal democratic theory has so far failed, primarily because it concedes the major premise of the delegitimizing argument. The premise is that judicial review is inherently counter-majoritarian and, as such, is in sore need of a logical justification. I dispute the premise. I am unconvinced that what might be termed *effective* judicial review—the production of judicial decisions that work important changes in society—is necessarily counter-majoritarian, and I doubt whether efforts to justify it in terms assuming that it is can possibly succeed. I am quite skeptical of efforts

---

4 *Id.* at 69.

5 *Carter, Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle, 94 Yale L.J. 821 (1985).*

6 *Id.* at 831-40.

7 *Id.* at 823.
to justify the modern Supreme Court’s search for fundamental rights by
“proving” that some set of rights “really is” constitutionally protected. I am
equally unconvinced by the arguments aimed at “proving” that the same set
of rights “really isn’t.” In fact, I doubt whether the fundamental rights
jurisprudence is even a useful place to search for the “proof” that convent-
tional theorists seem to require of each other.

Thus in my Indeterminate Text essay, I proposed that liberal scholars
seeking to repulse the delegitimizing assault (and to preserve their favorite
fundamental rights decisions) should leave grand theories for a time and
undertake a different task: To try to preserve the checks and balances
inherent in the structure of what I call the “political Constitution.” This they
should do in part by propounding interpretive rules that will narrow judicial
ability to work changes in that structure, and in part through a critical
analysis of doctrines the courts now apply when facing constitutional ques-
tions concerning the structure of government.

The political Constitution comprises those provisions of the Constitution
that establish the structure of the government of the United States. These
provisions are quite frequently more concrete than the open-ended clauses
protecting individual rights. I noted in my original essay that whereas the
individual rights clauses tend to be worded so broadly that a substantial act
of faith is required to explain why their construction should be tied to some
specific set of views at some specific time, the structural clauses are gener-
ally phrased as though they have more specific referents. I certainly did not
mean to suggest what Professor Chemerinsky quite properly refutes, that the
structural clauses are always more concrete than individual rights provisions
or that they are necessarily self-executing; I did not insist that they are
always clear at all. I did assert, however, that they are often relatively clear,
that reasonable and workable interpretations of many of them have been
developed in our governmental praxis without resort to judicial review, and
that as a consequence—and also for other reasons that I shall explain—the
courts, when judicial review is necessary, ought to select interpretive rules
that limit their ability to upset the working balance of powers.

The clauses constituting the government of the United States are part of a
concrete plan of checks and balances and the sharing of power. This struc-
ture is designed, in Justice Jackson’s phrase, to “integrate the dispersed
powers into a workable government.” Although judges and scholars some-
times forget the fact, the courts take their authority from and act within that

8 Id. at 853-55.
9 Id. at 854. But see Tushnet, A Note on the Revival of Textualism in Constitu-
tional Theory, 58 S. CAL. L. REV. 683 (1985) (arguing that at best only a handful of
insignificant structural clauses may be considered determinate).
10 Carter, supra, note 5, at 853-54.
11 Id. at 855-59.
12 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson,
J., concurring).
integrated structure even as they interpret it, and therefore ought to be self-consciously reserved about the tension between their dual roles as player and referee. Thus when I propose the selection of rules of construction that narrow the ability of the judges to read what they please into the structural provisions, I do so not because the need to narrow judicial discretion is a God-given concomitant of the constitutional process, but rather because a judge who is adjudicating a case arising under the political Constitution is construing the rules that govern the system of checks and balances. It is this system, dynamic and complete, that makes judicial review possible. A judge whose discretion is unfettered in construing the rules of the game is in essence acting as referee while out on the playing field. It is this discretion—the freedom for each judge to read what she pleases into the structural clauses—that a theory aimed at protecting the judicial function must curtail. I am not calling for some wholly "objective" standard, and I would not deny the creative aspect of the interpretation of these clauses; I would simply choose rules that channel this creativity.

This choice does not rest on an assumption that the clauses of the political Constitution are somehow already determinate, that the meaning of every provision is perfectly plain. The choice of narrowing interpretive rules rests instead on the function of the structural clauses. These clauses are constitutive in a literal sense: They tell us how the federal government was designed to operate. That the design is not always crystal clear does not mean that there is no design. Thus the same choice of interpretive rules tending to narrow judicial discretion should be applied in construing those structural clauses that are less determinate than others.

The project, in this sense, is not to take what is already determinate and render it more so, for I do not mean to claim that every clause that is within the political Constitution is more determinate than every clause that is not; the project instead is to render the whole of the political Constitution as determinate as possible. If this can be done, then I believe that mainstream legal scholars will have taken a very long step toward refuting the contention that judicial review is a garish and loosely hanging thread within the fabric of liberalism. If the work of the courts can be shown to be part of a dynamic and functioning system of checks and balances, then the debate suddenly involves something quite different than before.

---

13 See Carter, The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision, 131 U. Pa. L. Rev. 1341, 1368 (1983). Professor Chemerinsky contends that "the very existence of judicial review cannot be justified from an originalist perspective." Id. at 57. The better evidence, however, is to the contrary. See e.g., R. Berger, Congress v. The Supreme Court (1969); C. Black, The People and the Court (1960).

Choosing rules of interpretation that help render the system of checks and balances determinate is vital to the success of this project. The system was designed with a particular vision of government operation in mind. If the goal is restricting the freedom of the judge to alter the rules that bestow her authority, and if one believes that those who wrote and ratified the Constitution shared a consensus, an original understanding on the operation of the system of checks and balances of which judicial review forms so vital a part, then a rule requiring consideration of that understanding is a sensible one to choose.\(^{15}\)

But even this much seems to cause trouble. The word “originalism” nowadays has understandably become a red flag to many theorists, carrying as it does lurid images of reaction and retrenchment run rampant. If my modest proposal seems to march behind the banner fully unfurled, then perhaps I have failed to explain with adequate care what I have in mind. My claim is not that originalism is value-free, at least not in the sense in which Professor Chemerinsky uses the term when he states: “The decision to implement the Framers’ values is a normative choice.”\(^{16}\) Of course the choice is normative, which is why I sought to make clear that when I refer to rules of construction that are relatively value-free (I do not omit the qualifier as he does), I am speaking of rules demanding the fewest value choices from the interpreter in the process of their application.\(^{17}\) It is the application of the interpretive rule to the relevant text—not the selection of the rule itself—that should be as neutral as possible.\(^{18}\) That selecting an interpretive rule calling for any degree of originalism requires a value choice is quite plain to me, although this by itself is not an argument against originalism, since the selection of every other interpretive rule also requires a value choice. The responsibility of a theorist is to articulate the value involved, to state the reasons behind the choice of a particular interpretive rule. I had thought that my essay set forth the values that led me to select a moderately originalist

---

\(^{15}\) I do not mean to assert, however, that a rule calling for consideration of an original understanding is the best rule or the only rule that can be applied to the task I set out. See infra notes 67-68 and accompanying text.

\(^{16}\) Chemerinsky, supra note 3, at 63.

\(^{17}\) Carter, supra note 5, at 861-65. Obviously, I misspoke when I wrote that courts should strive “to avoid value-laden rules of interpretation” when adjudicating cases arising under the political Constitution. Id. at 862. It is not the rules but the process of application that must be as free of ad hoc value judgments as the interpreters can make it, and the rules that I propose would “render considerably more difficult the task of masking value choices behind legal generalizations.” Id.; see also Greenawalt, The Enduring Significance of Neutral Principles, 78 COLUM. L. REV. 982 (1978).

\(^{18}\) The distinction is crucial. The mere fact that a value choice is necessarily involved in the selection of a rule does not mean either that an interpreter cannot strive to avoid a similar value choice in its application or that she cannot select a rule limiting the opportunity for that second, often surreptitious value choice. See Fiss, Conventionalism, 58 S. CAL. L. REV. 177 (1985).
rule in the narrow sphere within which I consider that strategy a sensible one. 19

Professor Chemerinsky ridicules this strategy. "It is circular," he writes, "to argue that because the Framers intended that we follow their intent, we are obligated to follow it." 20 I quite agree, which is why I noted in my essay that "I do not rest my argument concerning the weight to be given the Framers' views on the weight they intended their views to have." 21 I think that Phillip Bobbit had the point exactly right when he pointed out that, absent an independent argument for following their will, holding that we must enforce the author's view of the scope of a constitutional clause because the author wrote it makes no more sense than holding that we must enforce the view Democritus had of an atom simply because he coined the word. 22 Consequently, the interpretive visions of the document's authors are relatively unimportant to my scheme. 23 I propose the approach that I do for reasons quite apart from any interpretive tautology.

For me the selection of interpretive rules reflects a value judgment, and quite an important one: I am seeking a strategy to confine the judicial ability to create what I have called "fresh checks"—checks not a part of the constitutional scheme of balanced and separated powers. 24 My goal, as I explained in the original essay, is to construct a constitutional safe harbor, a place where adjudication will be possible through an ordered application of interpretive rules to a text and its history. 25 The political Constitution strikes me as the obvious place to build, at least if we want an edifice that will stand. Were the courts somehow above the political fray rather than an integral part of it, finding narrowing hermeneutical methods would perhaps be less important. But if the work of the judiciary is, as I have suggested, a vital part of the system of checks and balances, then rendering that system as concrete as can be is plainly indispensable.

19 See Carter, supra note 5, at 859-65.
20 Chemerinsky, supra note 3, at 59; see also Kay, Preconstitutional Rules, 42 Ohio St. L.J. 187, 193 n.22 (1981).
21 Carter, supra note 5, at 858 n.139. Indeed, faced with Jefferson Powell's work in this area, only a very bold or very foolish theorist would dare assert that those who wrote and ratified the Constitution wanted to bind later generations to their narrow conception of the scope of their document. See Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).
22 See P. Bobbitt, Constitutional Fate 9 (1982).
23 I say "relatively" unimportant because I do care about whether the language of the text seems designed to invite the importation of external considerations in its interpretation, or whether the words reflect a narrower conception. I do not consider the interpreter wholly bound by this design, but I also do not see how an interpreter can ignore it altogether. See Dworkin, supra note 2, at 488-98.
24 See Carter, supra note 5, at 862-65; infra notes 62-63 and accompanying text.
25 Carter, supra note 5, at 864-65.
I do not necessarily propose the selection of the same interpretive rules when the proper construction of one of the open-ended individual rights clauses is at issue. I am quite convinced that bounded interpretation is important under these clauses too, but the bounds can be drawn quite differently. The scope of allowable discretion can be left broader, if the review itself takes place as part of a functioning and integrated system of checks and balances. By explaining the significance of this system, I hoped to tilt some part of the scholarly enterprise toward its explication.

That much and no more was my goal. I admit that the Indeterminate Text essay took a controversial route to get there, and I should take a few paragraphs to say why I chose it. As Professor Chemerinsky notes, I first spent a few pages doing what probably too many articles in this genre do—picking apart the efforts thus far to defend the liberal conception of judicial review. I then tried to explain what I perceive to be the limited counter-majoritarian significance of the fundamental rights decisions, which remain central to the debate. When I say that the counter-majoritarian significance is limited, I do not mean to suggest that there is none. My point is that the governing role of courts is partly illusory. Over the very shortest term—the span of a single decision constraining the parties to it—any judicial decision might be termed effective and in a sense counter-majoritarian. Perhaps even this rather mild binding effect might be contrary to liberal democratic theory if not properly justified, but direct obedience by the parties involved seems quite a weak test of runaway governance. The right test for effectiveness of judicial action, for the authoritativeness of judicial pronouncements, and for the anti-democratic effect of any decision, is surely not the last case but the next one.

Even when the most self-consciously interventionist judge hands down an opinion intended to decree a revolution, that decision stands little prospect of lasting significance unless joined to a movement through which the people change their own world. In the end it is societal transformation that solidifies what the court might begin. If the society transforms itself in response to judicial reprimand, as it began to do in the wake of Brown v. Board of Education, that does not strike me as a counter-majoritarian result. If the society refuses to transform itself, as it did in battling and beating Lochner v. New York and its progeny, and the Court retreats, that does not strike me as a counter-authoritarian result. Sometimes the courts succeed in chang-

26 Id. at 831-47.
27 See id. at 849-52.
30 198 U.S. 45 (1905).
31 The counter-authoritarian difficulty that occurs when the Constitution is not enforced receives considerably less attention from contemporary scholars than the counter-majoritarian difficulty said to occur when it is. Cf. Gunther, The Subtle Vices...
ing the face of our society. Sometimes they fail. The distinction rests importantly on popular unwillingness to indulge the transformation—a quintessentially democratic form of resistance. I hesitate to conclude that the argument over the justification for this purportedly counter-majoritarian difficulty is a waste of time, but I do suspect that there is less to it than there may seem. The Justices and their constituents pay attention to each other, and that strikes me as a result both pro-majoritarian and pro-authoritarian.

One criticism of such dialogic arguments as this one notes that if the judges read the text of popular opinion and use that text to inform their decisions—and in particular, to learn when to retreat—then while the courts may be playing a role in governance, they are not enforcing the discoverable law. But this criticism has less force than may appear. While the dialogic conception is partly descriptive, I would add a normative gloss as well: Whether sensitive to the response to their judgments or not, the judges ought be self-conscious about the process through which they render their decisions. Judges, to the extent they are able, should try to set out in their opinions the arguments that really swayed them, and to explain the interpretive rules they have applied to reach their results. In other words, the judges should try to enforce a discoverable law.

This element of striving can play a vital role in adjudication. A judge who is honest will set out as clearly as she can the interpretive rules she has applied in assigning meaning to a given text; she will try to explain what has grounded her exercise of creative imagination. This self-referencing will necessarily be incomplete, but the judicial task is to strive—not to win. A judge who is self-conscious about her choice and application of rules should more readily be convinced by strong arguments that her interpretive choices or analytical technique are poor. That she may sometimes retreat—playing of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1 (1964) (disputing the view that Justices should seek devices for avoiding decisions).

32 Cf. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 752 (1982): Neither the objectivity nor the correctness of Brown v. Board of Education depends on the unanimity of the justices, and much less on the willingness of the people—all the people, or most of the people—that or even now—to agree with that decision. The test is whether that decision is in accord with the authoritative disciplining rules. Short of a disagreement that denies the authority of the interpretive community and the force of the disciplining rules, agreement is irrelevant in determining whether a judge's decision is a proper interpretation of the law.

33 A judge who is self-conscious in the sense that I use the term is one who while aware of her prejudices tries to fight them, so that in her mind, at least, she is making her decision as best she can by applying the rules that she has chosen to the text she is called upon to explicate. Her written justification for her decision should set forth both rule and text along with the analysis so that a reader can understand her argument and more effectively critique it. Cf. Fiss, The Supreme Court, 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 13-14 (1979).
her dialogic role—does not mean she is not trying to enforce the law as she understands it.

The other side of the critical coin is the claim that the dialogic conception of judicial review, despite surface allure, is at bottom undemocratic. Thus Judge Bork in a recent article has ridiculed dialogic arguments of this sort with the assertion (presumably satirizing Keynes) that "[t]he theory assumes . . . that in the long run none of us will be dead."34 What he means, I suppose, is this: If wriggling out from under an illegitimate judicial decision takes more than a lifetime, then someone is bound by it forever, and that cannot be the meaning of our democracy. The criticism packs a hefty rhetorical punch, but it necessarily rests on at least one of two worrisome assumptions: First, that the courts are undemocratic whenever they are wrong, and second, that bad results are undemocratic if they bind anyone for a lifetime. The first assumption invites a revolution if ever a judge makes an error; but if instead a larger pattern of abuse is needed before the courts are acting undemocratically, then the long run is a perfectly sensible time to wait. The second assumption would destroy, among other things, the jury system, as there are rare cases in which the innocent are made to suffer unjustly; but if single cases are not the test, then, again, we can wait out the long run to deliver our verdict on the work of the courts.

Democracy and the Constitution, then, might exist more comfortably than conventional theorists and their critics suppose. At the very least, there seems to be rich ground here for study, and study is all that my original essay proposed.35 I do not insist that the research I propose will conclude that my theory is right. On the contrary, it may be that my description of the fundamental rights cases is deeply flawed; it may be that my normative prescription is a poor one; it may be that the structure of the Constitution retards the development of the dialogue needed to make the theory work. All of this remains to be learned.36

These themes, I thought, were clear enough in my original essay, but it may be that I was mistaken. Professor Chemerinsky, like some of those who have corresponded with me, has apparently misapprehended the nature of my research project, and so I should take pains to clarify my intention. I did not mean to argue that all the Court's fundamental rights decisions have yielded results that "would have been produced by the political

this vision is naive, but I have known too many judges who strive for this ideal to assume cynically that none succeed.

34 Bork, supra note 28, at 390.
35 See Carter, supra note 5, at 865-72.
I find it hard to conceive of so absurd a notion—and consequently, Professor Chemerinsky’s tidy refutation of that empirical proposition is quite beside my main point. The language to which I assume he is referring is this:

[A] colorable case can be made that with the possible exception of Baker v. Carr, which may be a special case, none of the Court’s fundamental rights decisions has worked a societal change so fundamental and revolutionary that it could not in fairly short order have been brought by other means. I am not here suggesting that the decisions are unimportant but rather resisting the notion that social change has come about solely because the Supreme Court has decreed it. The Court might play a vital role in the process of moral evolution, but in the end, law is not effective unless the nation changes itself.38

Professor Chemerinsky quite properly chides me for my use of the phrase “in fairly short order,” which carries quite the wrong implication and is contrary to the main thrust of my argument. The phrase is overly flippant and I cheerfully withdraw it. But it is only a four-word excerpt from a much longer argument. The key point is not whether political processes (or other means of altering the consciousness of a society) could have accomplished the same societal changes so rapidly. I meant to emphasize instead that absent a change in public belief and behavior, even the most morally celebrated judicial decision would over time prove empty. Thus on the next page I added:

Obviously, in each case American history would have been different—perhaps briefly—had the decision gone the other way, but it is difficult to resist the conclusion that the ultimate resolution of each controversy was or will be the result of public dialogue and political decision.39

And finally:

Relatively few judicial decisions cannot be circumvented by a sufficiently clever legislature or an adequately aroused populace; that more decisions are not overturned simply indicates that public opinion that a case is wrongly decided does not translate automatically into public determination to change it—as many politicians have learned to their frustration. Other decisions may survive because, quite simply, the public changes its collective mind. When public opinion shifts to accept a once-controversial judgment, the people, not the courts, are nevertheless governing. . . . By holding up to stark scrutiny societal practices they consider pernicious, the Justices may propel otherwise indifferent citizens to the conscious decision whether to continue or abandon the practices. Thus, whether the controversial decision is obeyed, evaded,

37 Chemerinsky, supra note 3, at 49.
38 Carter, supra note 5, at 850 (footnote omitted) (emphasis added).
39 Id. at 851.
or overturned, the ultimate decision rests with all political actors, not merely the judicial ones.\textsuperscript{40}

Now, this might well strike the reader as a claim that political processes could duplicate the work of courts, and if it does, I must apologize, because I did try to craft the argument with care. My emphasis was not on any particular process of change, but rather on the interaction among the courts and the many other actors necessarily involved in any movement toward transformation. I knew when I offered it that conventional theorists would likely be taken aback—perhaps with reason!—by this limited vision of the role the courts play in governing America, and perhaps I should have laid more important stress on the tentative nature of my thoughts. But this vision was only one of two distinct arguments. It was by no means a premise for what followed; I stated explicitly that it was an option, that one who rejected this claim could nevertheless seek solace in the next part of what I had to say—my explication of the political Constitution.\textsuperscript{41}

The justification project that I have set out—and it is only a project, not a grand theory, or at least not yet—turns less on the reader's appreciation of my vision of the limited counter-majoritarian significance of the fundamental rights cases than on the ability of scholars to demonstrate relatively clear meanings for the structural provisions that make up the political Constitution. Whether this can be done through the selection of appropriate interpretive rules depends on one's understanding of the nature of the interpretive enterprise, the problem to which I next turn.

II. \textbf{The Nature of Interpretation}

"Interpretation" is the name that we give to the process through which the significance of a text is explicated. Interpretation takes place in two "locations": in the mind of the reader and in the context of the world. It does not take place "within" a text. At best, a text is nothing more than a symbol providing the opportunity for interpretation. The text is the thing that is interpreted, but it does not interpret itself.\textsuperscript{42} I would not deny that a text, once interpreted, may be said to "have" a meaning. The meaning it has, however, is the one that the interpretive process yields, and is consequently no more authoritative than the process that produced it.

\footnotesize
\textsuperscript{40} Id. at 851-52.

\textsuperscript{41} See id. at 853 ("Those who find unpalatable the assertion that the fundamental rights decisions represent only a small component of governance may find this alternative argument somewhat easier to digest.").

\textsuperscript{42} In modern literary theory, the proposition that the meaning of a text necessarily varies with the interpretive context is prominent in the work of Jacques Derrida, the founder of Deconstructionism. See, e.g., J. Derrida, Dissemination (B. Johnson trans. 1981); J. Derrida, Of Grammatology (G. Spivack trans. 1976); see also H. Bloom, P. De Man, J. Derrida, G. Hartman & J. Miller, Deconstruction and Criticism (1979) (essays toward developing a theory of difference).
A text does not have meaning in the way that a human hand may have fingers. A meaning is assigned by an interpreter through an interpretive process. It is not assigned in the way that a student is assigned a seat in elementary school, but more in the way that a theory is assigned to explain an observed phenomenon. Propounding and testing theories is a creative process; so is interpretation. The interpretation propounded in the explanation of any given text, moreover, will vary with the purpose for which the act of interpretation is undertaken. If I see a man brandishing a huge knife as he dances on a street corner shortly after midnight, the next day's leisurely classroom inquiry "What was he trying to say?" and the more mundane contemporaneous puzzle "Is it safe to pass?" are both interpretive questions, but they serve different ends and have different answers.

Adjudication under the Constitution (or any other legal text) is quintessentially an act of interpretation, too. Like it or not, meaning is created, not simply found, when a judge interprets the Constitution; the interpreting judge engages in an act of creation. Creation in turn demands imagination. Because a judge called upon to decide a case turning on a constitutional interpretation engages in a creative act, she also engages in an act of imagination. The text provides the occasion, but the judicial mind—always, set in its larger context, of the world in general and the judge's socialization in particular—undertakes the act itself.

To say that interpretation is creative and imaginative is not, however, to say that it is unbounded. Human imagination can always be bounded by rules. When Stephen King, perhaps the best-selling novelist of our time, sits down to write, he does so with a keen understanding of what will scare people and what will keep them turning the pages. His creative act is bounded by the rules of his twin endeavors: satisfying his public and selling books. More formal rules may also serve to channel the creative imagination. What I write will not be identical to what I think, because what I write is bounded by rules of grammar that do not hamper my mental imagery; I write in order to communicate, and the rules of that project limit my freedom. The same is true for rules of interpretation: By their nature, they limit
the freedom of the observer to find meaning in a text. The observer may quarrel with or applaud the motivation of the propounder of any particular set of interpretive rules. But whether those rules call for enforcing an understanding drawn from historical materials,\textsuperscript{48} the advancement of socialism,\textsuperscript{49} or the maximization of wealth,\textsuperscript{50} they serve equally well to constrain the creative freedom of the interpreter. I do not propose that these rules are moral equivalents, but I do believe that each is capable of relatively neutral application.

The fact that any rule can constrain creative freedom is sometimes missed by those who assert that constitutional theories fall into two categories, "interpretive" and "non-interpretive." The error is the assumption that one school assigns to the Constitution a different importance than the other. This simply isn't so. When Aloysius cries "intent of the Framers" and Bernadette ripostes "emergent moral consensus" their disagreement is not over the weight to be assigned to the Constitution, but rather over the rules that will bind the interpreter in the creative act of transforming its symbols into policy.\textsuperscript{51} Paul Brest and Laurence Tribe do not respect the Constitution any less than do Robert Bork and Raoul Berger; their argument is over what demands that respect places on the interpreter. Each theorist's view on the best means for channeling the creative imagination of the reader is put forth as a set of interpretive rules.\textsuperscript{52}

\textit{tion of Contract Doctrine}, 94 \textit{Yale L.J.} 997, 1039-66 (1985). Although critical legal scholars sometimes present this proposition as though it represents a startling and fresh insight, not all mainstream scholars have been duped into reification. \textit{Cf.} B. Cardozo, \textit{The Nature of the Judicial Process} 100 (1921) ("We no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit.").


\textsuperscript{50} \textit{See} R. Posner, \textit{The Economics of Justice} (1981).

\textsuperscript{51} \textit{See} Dworkin, \textit{supra} note 2, at 471-76.

\textsuperscript{52} Those who advocate the so-called "plain meaning" rule and the various forms of originalism sometimes assert that only they are truly "interpreting" the texts, because only they are trying to find out what the writers "really meant." \textit{See}, e.g., Berger, \textit{Paul Brest's Brief for an Imperial Judiciary}, 40 Md. L. Rev. 1 (1981); Meese, \textit{The Battle for the Constitution}, Pol'y Rev., Winter 1986, at 35. But an argument of this nature assumes its conclusion: Someone else could just as easily say that only she is truly "interpreting" the texts, because only she is trying to find out how to use the text to advance the cause of world socialism. A separate case must be made to explain why one set of interpretive rules is superior to another. In the absence of a community sharing a consensus on the correct interpretive rules to be applied to the text, this may often be impossible. \textit{See} S. Fish, \textit{Is There A Text in This Class?} (1980). Owen Fiss has suggested that the legal community may be of this nature, \textit{see} Fiss, \textit{supra} note 32, at 746-50, but I have my doubts, \textit{see} Carter, \textit{supra} note 5, at 835-37.
The crucial question for many constitutional theorists is whether the rules governing interpretation can be set out with clarity sufficient to render constitutional adjudication something other than the judge’s imposition of her own value preferences. Those I call “delegitimizers” are of the view that mainstream liberalism cannot resolve this question: liberals, if they seek rules to cabin judicial freedom, are stuck with a Bickelean exaltation of process and a process that occasionally produces repugnant results. The only answer liberals can come up with, so the argument goes, is the fundamental rights form of judicial review, that is, to ignore the process—and any coherent rules for interpretation that the process might require—and impose better results. But this of course is what classical liberalism forbids, for there must, in liberal theory, be a way of recognizing law and distinguishing it from simple power.53 Judges in the liberal state are to enforce this recognizable law. If they do something else—for example, enforcing their preferences and calling them law—they are violating the rules that make liberal constitutional adjudication possible. Thus the essence of the critique is not that the fundamental rights jurisprudence reaches substantive results that are good or bad—such notions are quite irrelevant—but rather, that liberal political theory cannot explain it.54 And if even liberals admit that they must sometimes step outside their own system in order to avoid morally repugnant results, then their system must on its own terms be immoral.55

All of this should be quite familiar to those who follow the contemporary debate on constitutional meaning, but it bears repeating because my original essay apparently left these matters unclear. I see the same theoretical muddle as everyone else, but I am less disturbed by it. I have not tried to prove that the muddle is clear or even good; I certainly have not sought to explain, justify, or refute the Supreme Court’s jurisprudence on matters of individual right. I have tried only to recommend paths that those seeking to resolve the legitimacy question might follow. The most important of those paths concerns the proper interpretive rules to be used in bounding interpre-


54 There is a separate delegitimizing argument emphasizing the results reached and arguing that they reinforce an entrenched order that is inherently repressive. For a sampling of this work, see the essays collected in THE POLITICS OF LAW (D. Kairys ed. 1982).


56 Of course the argument is richer than my inadequate textual summary. Those wishing to understand it in all its subtlety should look to the original sources. See Carter, supra note 5, at 822 n.4, 824 n.8, 825 nn.9-10 (citing articles taking this critical stance).
tation under the political Constitution. My reluctance to insist on the same rules for interpreting the fundamental rights clauses reflects no disbelief in the possibility of concrete interpretation; it reflects instead my understanding that interpretation under different provisions of the Constitution may be undertaken for different reasons and thus may well be bounded by different sets of rules. But even if I am wrong—even if the paths I suggest are poorly chosen—they at least should be criticized for where they claim to lead, not for where they might have gone instead.

Yet I fear that the interpretive notion I had in mind when I decided to use the word “originalism” has been freighted with all the interpretive baggage the term has come to carry in constitutional debate. For example, after concluding that I have advocated originalism, Professor Chemerinsky announces that originalism “refers to a method of deciding cases based solely on the stated or intended meaning of constitutional provisions.”57 He cites Paul Brest for this proposition.58 His critique of originalism as Professor Brest first defined it is powerful, but it is also unenlightening, since I do not use the word in the same way. I am not sure how one would define or identify an “intended meaning,” and I do not know why such a creature ought to guide interpretation. But on somber reflection, I realize that the language I used in describing the beast I have in mind is sufficiently ambiguous that Professor Chemerinsky’s reading may be a natural one. Consequently, I should explain briefly what I hoped to convey.

The originalism that I advocate concerns only the Framers’ plan for the day-to-day operation of the government, and within this limitation it is aimed primarily at the system of checks and balances. I don’t care a whit whether the Framers expected all the Presidents to be men59 or hoped that slaves would never beget voters.60 I care instead about the Framers’ shared understanding on the ways in which the government institutions they established would interact. When I make reference to the original understanding, I mean precisely that: An understanding, a generally shared view—if one can be found—on these day-to-day operations. Thus I have argued elsewhere that

57 Chemerinsky, supra note 3, at 50.
58 Id. n.17 (citing Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. Rev. 204, 204 (1980)). As Professor Brest recognizes, the varieties of originalism are not easily captured in a single, neat definition. See Brest, supra, at 205-18, 222-24.
59 Professor Chemerinsky uses this example to show that even as applied to structural clauses, strict originalism of the form that he describes may produce morally repugnant results. See Chemerinsky, supra note 3, at 56. I wholeheartedly agree.
Nixon v. Fitzgerald was right to hold the President immune from civil damages liability for his official misconduct, not because damages would be good or bad policy, and certainly not because some scrap of constitutional history showed that some group of individuals at the time of ratification thought that this liability would be a horrible thing, but rather because a study of the history convinced me that those who wrote and ratified the Constitution spent considerable time and effort working out the ways in which presidential power ought to be checked. In the face of this broadly shared understanding on the weapons available to rein in an errant Chief Executive, I wrote, no court should lightly imply a cause of action for damages, because that cause of action would constitute a fresh check and would thus risk upsetting the balance. The interpretive question was not whether anyone "intended" civil damages liability, but rather whether those who wrote and ratified the Constitution had worked out an understanding on how the President ought to be disciplined, and whether an implied cause of action for damages fit snugly into the scheme that the Framers worked out.

In a similar vein, I have recently been critical of a proposal by the Federation of American Scientists to require the President to obtain the permission of a congressional committee before he can make a "first use" of nuclear weapons. Although I quite agree with those who assert that the war power is qualitatively different from other congressional prerogatives, my consideration of the history has convinced me that the general understanding at the time the Constitution was ratified held that the Congress as a whole—not some committee—was the appropriate body to check the President's use of the armed forces. A court interpreting the warmaking provisions in light of this history might well sustain a requirement that the President receive the permission of the entire Congress before expending a nuclear weapon. But only by setting aside this history—by choosing an interpretive rule allowing greater creative freedom—could a court permit some subset of the Congress to perform the same task.

63 Id. at 1364-67, 1373-84.
64 See Stone, Presidential First Use is Unlawful, FOREIGN POL'Y, Fall 1984, at 94. A "first use"—the expenditure of any nuclear weapon for a hostile purpose—is not necessarily the same as a "first strike," which is a preemptive strategic attack.
These are both examples of what I mean when I say that judicial decision on the interpretation of structural clauses should be guided by the original understanding on the separation of powers and other aspects of the political Constitution. Creativity and judgment still have vital roles to play: It is the judge who must try to uncover and then to apply this contemporaneous expectation. But the creativity will be bounded by rules—rules that are selected in accordance with the purpose for which the interpretation is undertaken. From what I have said, it should be plain why I hold that the discretion of judges assigning meaning to the document's structural clauses must be quite narrow; in keeping with this purpose, a judge choosing interpretive rules under the political Constitution should select those that will most effectively restrict that discretion. It happens that rules calling for a search of the history will have this effect, but I hardly would claim that no other rules would do so. When I say that I recommend a scholarly project, that is exactly what I mean; if other scholars have better ideas, I look forward to their presentation.

III. The Weakness of Interpretation

Having restated (and, I hope, somewhat improved) my argument, I hasten to add that I am not altogether satisfied with it. Despite what I have said, I am not fully convinced that interpretative rules can by themselves serve to legitimate the peculiar process through which the American political system tests its laws and policies. But then, I am not sure that the interpretive rules are the most important place to look. It is the process, not any individual decision, that must be justified if the issue is the legitimacy of judicial review. If one dislikes a particular decision—Roe v. Wade, say, to take but the most frequently mentioned recent example among the Court's many controversial pronouncements—the argument ordinarily (and properly) pressed is that the case was wrongly decided. That is an argument quite distinct from the claim that the decision is beyond the power of the Court. To equate the two, as I believe some critics of Roe v. Wade have tended to do, is to recast the argument over legitimacy in a logically improper form: Judicial review is legitimate only when the correct results are reached.

67 I do not of course contend that judicial discretion in choosing rules to govern interpretation of constitutional clauses protecting individual rights should not also be restricted. I simply am less certain what the restrictions in individual rights cases ought to be.

68 Indeed, even using the history will not always have the desired effect of narrowing discretion. Cf. Kelly, Clio and the Court: An Illicit Love Affair, 1965 SUP. CT. REV. 119, 157 (accusing the Warren Court of rewriting history "to serve the interests of libertarian idealism").

69 See, e.g., Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 YALE L.J. 920 (1973) (suggesting that Roe is wrong in a way that is qualitatively different from the way in which other decisions are wrong).
The reason that this claim is logically improper should be clear. When a judicial decision is said to be incorrect, the reason may be that the application of the interpretive rules was poorly done or that the rules are themselves wrong. But in either instance, to call the exercise of judicial power illegitimate represents quite a peculiar understanding of what that power is and how it works. One aspect of the liberal state (in theory at least) is that for all its emphasis on individual autonomy, it permits the correction of errors without the need for resort to revolution. If this is so, then liberalism presumes that errors will occur, and that in the fullness of time they will be overcome. Judicial errors may be more difficult to overcome than errors of the more politically receptive branches, but no government error is overcome without effort.

Judicial errors are not undemocratic simply because they are more difficult to correct. It is after all the structure of the Constitution, not some abstract theory, that determines the degree and kind of democracy to be embodied in American practice. Thus there is little point to an inquiry that asks simply whether the difficulty involved in overturning judicial decisions

70 "[A] judge could misunderstand or misapply a rule and still be constrained by it . . . . Not every mistake in adjudication is an example of lawlessness." Fiss, supra note 32, at 748. It may be, as Professor Fiss suggests, that there are some selections or applications of interpretive rules so outrageous that one could not possibly call them legitimate but mistaken, and would have to call them illegitimate and abusive instead. A judge who is self-conscious about her role, however, would be unlikely to commit such an error. To pursue the example in the text, a legitimately self-conscious judge of good will could have come down on either side in Roe v. Wade.

71 As Robert Bork and others have pointed out, failure to come to grips with this point is the central flaw in John Ely’s otherwise quite challenging monograph on judicial review. See Bork, supra note 28, at 390 (commenting on J. Ely, supra note 1); see also Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981) (denying textual basis for Dean Ely’s argument); Tushnet, supra note 1 (same). An analogous failure, however, undermines the work of the many theorists who, like Judge Bork himself, assume too quickly that the institution of judicial review is not itself an important part of the scheme of majoritarian democracy that the Constitution is said to create. See Bork, supra note 28, at 383-84; see also Berger, supra note 52; Rehnquist, The Notion of a Living Constitution, 54 Tex. L. Rev. 693 (1976).

One may fairly ask, moreover, what political theory it is that tells us why this two-hundred-year-old document is the place we should look to learn how much democracy America ought to have. Bruce Ackerman has argued persuasively that if the initial ratification of the Constitution (not in accord with the forms of the Articles of Confederation) is binding and makes the document authoritative because “We, the People” adopted it, then any recreation of the level of political dialogue in which “We, the People” acted should be equally binding now. See Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984). This, too, is a dialogic theory, and a powerful one, although the difficulty in establishing rules of recognition to determine when the proper level of political dialog has been achieved
is a substantial one. What matters much more is whether that difficulty is something contemplated by the constitutional structure. Put this way, matters become almost too easy: Isolating the courts from political pressure is important in fulfilling the constitutional plan.\textsuperscript{72}

That plan makes no mention, of course, of a dialogue between the Supreme Court and its constituents. But the dialogic conception, as I mentioned, is largely descriptive rather than normative: Judicial decisions may be changed over time, and incorrect or oppressive rulings need not stand for eternity. Governmental mistake, moreover, is quite a different animal than governmental abuse. Thus the assertion that wrong exercises of judicial power betray the illegitimacy of granting the power at all is simply false. The better claim is that the work of the Court is illegitimate not if in particular cases it fulfills its task poorly, but only if its general task cannot be justified. The scheme that I have outlined, focusing on the system of checks and balances and on the rules for adjudication under it, is intended to justify that general task—not particular results.

Still, there are shuddering contradictions in my argument, and I am not proud of them. For one thing, it may seem at least peculiar that after so sharply criticizing the late Alexander Bickel's vision of a dialogic process, I would nevertheless come up with something quite similar as a part of my proposed justification project. But I would distinguish the classical form of the argument, which, as propounded by Professor Bickel, relies on some lurking threat of disobedience as the key to the dialogue,\textsuperscript{73} from what might be termed a neo-Bickelean form, which recognizes the mature constitutional culture that offers the courts a substantial degree of protection from defiance, while insisting that a dialogue is nevertheless joined. In this neo-Bickelean view, the Justices retreat not because they fear a lurking waste of scarce constitutional capital, but rather because they are convinced by the arguments against their position—surely a happier proposition for liberal theory. Even within this model, however, the force of public derision, as exemplified by the society's refusal to transform itself into the model the

---

\textsuperscript{72} See THE FEDERALIST NO. 78, at 466 (A. Hamilton) (C. Rossiter ed. 1961) ("The Complete independence of the courts of justice is particularly essential in a limited Constitution.").

\textsuperscript{73} Although the two books are from different phases of Professor Bickel's career and are consequently quite different in their emphases, the lurking theme of public withdrawal of consent to the judicial role is common to both A. BICKEL, supra note 1, which lectures the Court's critics for missing this point, and A. BICKEL, THE MORALITY OF CONSENT (1975), which lectures the Justices for precisely the same mistake.
judges have in mind, is one of the arguments that might cause the courts to reconsider the challenged decision model.

Another problem with dialogic arguments, however, is not so easily disposed of. The fear that some critics have is not that these arguments prove too much but that they prove too little. Dialogic conceptions of judicial review and democratic theory have in common with other conceptions a tendency toward weakness at the margins. If judicial review really proceeds in this manner—so the standard question runs—then what could a court do to stop the Holocaust? John Ely has answered by suggesting—wrongly, I think—that constitutional theory ought not to be tailored to marginal cases.74 Another form of response is to dismiss the question, concluding that were the flooding violence of a fresh Holocaust to break suddenly upon us, no mere judicial decision could turn the tide, and consequently, a theory that addresses the problem is by definition irrelevant.

But this response is not obviously correct. True, as I noted in my original essay, no judicial review is useful "if the people . . . are either brainwashed or essentially mean-spirited and unembarassed about it."75 True—but not sufficient as an answer. If the dialogic conception of judicial review is an accurate picture of the world, then a judge free to indulge the creative imagination has a better chance of preventing the greatest evils than does one bound to follow relatively arcane sources of law. The reason flows from the common vision of the educational role of the courts, a vision reinforced by a conception of judicial review as dialogue. In this role, the courts hold pernicious practices up to the light and force the public to acknowledge what it is doing. Yes, the people might continue and do whatever it is that their judges disapprove. But faced with a judicial statement that their campaign is unconstitutional—faced, say, with an official recognition of the murderous reality of a Holocaust—the one thing that people could not do is turn their backs and pretend that nothing was happening. Might a Holocaust come again anyway? To the sad discredit of the world, the only fair answer is that for all our prayers that it will not, it always might. But faced with a judicial decision ordering a halt, those perpetrating it and those trying to ignore it would have a much harder time telling themselves that only someone else's lives—not their own souls—were at risk.

This is an answer, but perhaps a weak one; dialogic models, no matter the labels under which they are filed, will always leave matters in a muddle. The point of my original essay was that muddling can be comfortable if the people are prudent and essentially of good will.76 If, through the generation

74 J. Ely, supra note 1, at 183; see also Schauer, Easy Cases, 58 S. Cal. L. Rev. 399 (1985) (contending that constitutional theorists spend too much time on the tough ones).
75 Carter, supra note 5, at 870.
76 Thus I wrote:
These day-to-day operations might easily be ridiculed as no more than a muddle, and there is a degree of truth to that description. But the degree of truth is a
of more determinate interpretations of the structural clauses, the judicial muddle can be limited to questions involving fundamental rights, the muddling can be more comfortable. If judicial review takes its proper place as part of a clear, dynamic, and functioning system of checks and balances, it is more comfortable still. There remains the task of learning whether the system of balanced and separated powers operates and can be understood through the proper application of a clear set of interpretive rules, and it is to that task that those who care about legitimacy should turn their efforts.

That, at least, is my own conclusion. If instead mainstream theorists stick with the effort to craft grand theories; if they prefer to fight over the best resolutions for claims of fundamental right; if they choose, calipers in hand, to measure the efficacy of specific checks on "counter-majoritarian" judicial review; if constitutional theorists do all of these things, I wish them luck. But I also wish they would stop saying that the rest of us are asking the wrong questions. For in the nature of scholarly enterprise, most questions have answers, whether or not the answers have yet been found. And any question that has an answer is a right one.

comfortable one; to say that the government muddles is not at all the same as saying that the government is lawless. Muddles, as Arthur Leff pointed out, come in more than one shape.

Id. at 857 (footnote omitted).