

FREEDOM'S LAW

THE MORAL READING OF THE
AMERICAN CONSTITUTION

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Introduction: The Moral Reading and the Majoritarian Premise

Constitutional Confusion

The various chapters of this book were first published separately, over a period of several years, and they discuss a variety of constitutional issues. Most of them were written during bitter constitutional arguments. The book discusses, in fact, almost all of the great constitutional issues of the last two decades, including abortion, affirmative action, pornography, race, homosexuality, euthanasia, and free speech. Some chapters are about particular decisions of the United States Supreme Court, including famous ones like *Roe v. Wade*, in which the Court first recognized a right to abortion, the *Cruzan* case, in which the Court had to consider whether people have a constitutional right to choose death in some circumstances, and *New York Times v. Sullivan*, in which the Court dramatically changed what free speech means in America. Some chapters include more general material. Chapter 3, for example, evaluates the familiar charge that many of the constitutional “rights” that the Supreme Court has identified in recent decades, including the right to abortion, are not actually “enumerated” in the Constitution at all, but were invented by the justices themselves.

The book as a whole has a larger and more general aim. It illustrates a particular way of reading and enforcing a political constitution, which I call the *moral* reading. Most contemporary constitutions declare individual rights against the government in very broad and abstract language, like the First Amendment of the United States Constitution, which provides that Congress shall make no law abridging "the freedom of speech." The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a moral principle—that it is wrong for government to censor or control what individual citizens say or publish—and incorporates it into American law. So when some novel or controversial constitutional issue arises—about whether, for instance, the First Amendment permits laws against pornography—people who form an opinion must decide how an abstract moral principle is best understood. They must decide whether the true ground of the moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography.

The moral reading therefore brings political morality into the heart of constitutional law.¹ But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative. In the American system judges—ultimately the justices of the Supreme Court—now have that authority, and the moral reading of the Constitution is therefore said by its critics to give judges absolute power to impose their own moral convictions on the public. I shall shortly try to explain why that crude charge is mistaken. I should make plain first, however, that there is nothing revolutionary about the moral reading in practice. So far as American lawyers and judges follow any coherent strategy of interpreting the Constitution at all, they already use the moral reading, as I hope this book will make plain.

That explains why both scholars and journalists find it reasonably easy to classify judges as "liberal" or "conservative": the best explanation of the differing patterns of their decisions lies in their different understandings of central moral values embedded in the Constitution's text. Judges whose political convictions are conservative will naturally interpret abstract constitutional principles in a conservative way, as they did in the early years of this century, when they wrongly supposed that certain rights over property and contract are fundamental to freedom. Judges whose convictions are

more liberal will naturally interpret those principles in a liberal way, as they did in the halcyon days of the Warren Court. The moral reading is not, in itself, either a liberal or a conservative charter or strategy. It is true that in recent decades liberal judges have ruled more statutes or executive orders unconstitutional than conservative judges have. But that is because conservative political principles for the most part either favored or did not strongly condemn the measures that could reasonably be challenged on constitutional grounds in those decades. There have been exceptions to that generalization. Conservatives strongly disapprove, on moral grounds, the affirmative action programs described in Chapter 6, which give certain advantages to minority applicants for universities or jobs, and conservative justices have not hesitated to follow their understanding of what the moral reading required in such cases.² That reading helps us to identify and explain not only these large-scale patterns, moreover, but also more fine-grained differences in constitutional interpretation that cut across the conventional liberal-conservative divide. Conservative judges who particularly value freedom of speech, or think it particularly important to democracy, are more likely than other conservatives to extend the First Amendment's protection to acts of political protest, even for causes that they despise, as the Supreme Court's decision protecting flag-burners shows.³

So, to repeat, the moral reading is not revolutionary in practice. Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments. As I shall argue later in this Introduction, they have no real option but to do so. But it would indeed be revolutionary for a judge openly to recognize the moral reading, or to admit that it is his or her strategy of constitutional interpretation, and even scholars and judges who come close to recognizing it shrink back, and try to find other, usually metaphorical, descriptions of their own practice. There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities. On the contrary, the moral reading is often dismissed as an "extreme" view that no really sensible constitutional scholar would entertain. It is patent that judges' own views about political

morality influence their constitutional decisions, and though they might easily explain that influence by insisting that the Constitution demands a moral reading, they never do. Instead, against all evidence, they deny the influence and try to explain their decisions in other—embarrassingly unsatisfactory—ways. They say they are just giving effect to obscure historical “intentions,” for example, or just expressing an overall but unexplained constitutional “structure” that is supposedly explicable in nonmoral terms.

This mismatch between role and reputation is easily explained. The moral reading is so thoroughly embedded in constitutional practice, and is so much more attractive, on both legal and political grounds, than the only coherent alternatives that it cannot readily be abandoned, particularly when important constitutional issues are in play. But the moral reading nevertheless seems intellectually and politically discreditable. It seems to erode the crucial distinction between law and morality by making law only a matter of which moral principles happen to appeal to the judges of a particular era. It seems grotesquely to constrict the moral sovereignty of the people themselves—to take out of their hands, and remit to a professional elite, exactly the great and defining issues of political morality that the people have the right and the responsibility to decide for themselves.

That is the source of the paradoxical contrast between mainstream constitutional practice in the United States, which relies heavily on the moral reading of the Constitution, and mainstream constitutional theory, which wholly rejects that reading. The confusion has had serious political costs. Conservative politicians try to convince the public that the great constitutional cases turn not on deep issues of political principle, which they do, but on the simpler question of whether judges should change the Constitution by fiat or leave it alone.⁴ For a time this view of the constitutional argument was apparently accepted even by some liberals. They called the Constitution a “living” document and said that it must be “brought up to date” to match new circumstances and sensibilities. They said they took an “active” approach to the Constitution, which seemed to suggest reform, and they accepted John Ely’s characterization of their position as a “noninterpretive” one, which seemed to suggest inventing a new document rather than interpreting the old one.⁵ In fact, as we shall see, this account of the argument was never accurate. The theoretical debate was never about whether judges should interpret the Constitution or change it—almost no one really thought the latter—but rather about how it should be interpreted. But conservative politicians exploited the simpler description, and they were not effectively answered.

The confusion engulfs the politicians as well, however. They promise to appoint and confirm judges who will respect the proper limits of their authority and leave the Constitution alone, but since this misrepresents the choices judges actually face, the politicians are often disappointed. When Dwight Eisenhower, who denounced what he called judicial activism, retired from office in 1961, he told a reporter that he had made only two big mistakes as President—and that they were both on the Supreme Court. He meant Chief Justice Earl Warren, who had been a Republican politician when Eisenhower appointed him to head the Supreme Court, but who then presided over one of the most “activist” periods in the Court’s history, and Justice William Brennan, another politician who had been a state court judge when Eisenhower appointed him, and who became one of the most liberal and explicit practitioners of the moral reading of the Constitution in modern times.

Presidents Ronald Reagan and George Bush were both profound in their outrage at the Supreme Court’s “usurpation” of the people’s privileges. They said they were determined to appoint judges who would respect rather than defy the people’s will. In particular, they (and the platform on which they ran for the presidency) denounced the Court’s 1973 *Roe v. Wade* decision protecting abortion rights, and promised that their appointees would reverse it. But (as Chapter 4 explains) when the opportunity to do so came, three of the justices Reagan and Bush had appointed between them voted, surprisingly, not only to retain that decision in force, but to provide a new legal basis for it that more evidently adopted and relied on a moral reading of the Constitution. The expectations of politicians who appoint judges are often defeated in that way, because the politicians fail to appreciate how thoroughly the moral reading, which they say they deplore, is actually embedded in constitutional practice. Its role remains hidden when a judge’s own convictions support the legislation whose constitutionality is in doubt—when a justice thinks it morally permissible for the majority to criminalize abortion, for example. But the ubiquity of the moral reading becomes evident when some judge’s convictions of principle—identified, tested, and perhaps altered by experience and argument—bend in an opposite direction, because then enforcing the Constitution must mean, for that judge, telling the majority that it cannot have what it wants.

Senate hearings considering Supreme Court nominations tend toward the same confusion. These events are now thoroughly researched and widely reported by the media, and they are often televised. They offer a

superb opportunity for the public to participate in the constitutional process. But the mismatch between actual practice and conventional theory cheats the occasion of much of its potential value. (The hearings provoked by President Bush's nomination of Judge Clarence Thomas to the Supreme Court, discussed in Chapter 15, are a clear example.) Nominees and legislators all pretend that hard constitutional cases can be decided in a morally neutral way, by just keeping faith with the "text" of the document, so that it would be inappropriate to ask the nominee any questions about his or her own political morality. (It is ironic that Justice Thomas, in the years before his nomination, gave more explicit support to the moral reading than almost any other well-known constitutional lawyer has; he insisted, as Chapter 15 explains, that conservatives should embrace that interpretive strategy and harness it to a conservative morality.) Any endorsement of the moral reading—any sign of weakness for the view that constitutional clauses are moral principles that must be applied through the exercise of moral judgment—would be suicidal for the nominee and embarrassing for his questioners. In recent years, only the hearings that culminated in the defeat of Robert Bork, discussed in Part III, seriously explored issues of constitutional principle, and they did so only because Judge Bork's opinions about constitutional law were so obviously the product of a radical political morality that his convictions could not be ignored. In the confirmation proceedings of now Justices Anthony Kennedy, David Souter, Thomas, Ruth Bader Ginsburg, and Stephen Breyer, however, the old fiction was once again given shameful pride of place.

The most serious result of this confusion, however, lies in the American public's misunderstanding of the true character and importance of its constitutional system. As I have argued elsewhere, the American ideal of government not only under law but under principle as well is the most important contribution our history has given to political theory. Other nations and cultures realize this, and the American ideal has increasingly and self-consciously been adopted and imitated elsewhere. But we cannot acknowledge our own contribution, or take the pride in it, or care of it, that we should.

That judgment will appear extravagant, even perverse, to many lawyers and political scientists. They regard enthusiasm for the moral reading, within a political structure that gives final interpretive authority to judges, as elitist, antipopulist, antirepublican and antidemocratic. That view rests, as we shall see, on a popular but unexamined assumption about the connection between democracy and majority will, an assumption that

American history has in fact consistently rejected. When we understand democracy better, we see that the moral reading of a political constitution is not antidemocratic but, on the contrary, is practically indispensable to democracy. I do not mean that there is no democracy unless judges have the power to set aside what a majority thinks is right and just. Many institutional arrangements are compatible with the moral reading, including some that do not give judges the power they have in the American structure. But none of these varied arrangements is in principle more democratic than others. Democracy does not insist on judges having the last word, but it does not insist that they must not have it. I am already too far ahead of my argument, however. I must say more about what the moral reading is before I can return to the question of why it has been so seriously misunderstood.

The Moral Reading

The clauses of the American Constitution that protect individuals and minorities from government are found mainly in the so-called Bill of Rights—the first several amendments to the document—and the further amendments added after the Civil War. (I shall sometimes use the phrase "Bill of Rights," inaccurately, to refer to all the provisions of the Constitution that establish individual rights, including the Fourteenth Amendment's protection of citizens' privileges and immunities and its guarantee of due process and equal protection of the laws.) Many of these clauses are drafted in exceedingly abstract moral language. The First Amendment refers to the "right" of free speech, for example, the Fifth Amendment to the process that is "due" to citizens, and the Fourteenth to protection that is "equal." According to the moral reading, these clauses must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits on government's power.

There is of course room for disagreement about the right way to restate these abstract moral principles, so as to make their force clearer for us, and to help us to apply them to more concrete political controversies. I favor a particular way of stating the constitutional principles at the most general possible level, and I try to defend that way of conceiving them throughout the book. I believe that the principles set out in the Bill of Rights, taken together, commit the United States to the following political and legal ideals: government must treat all those subject to its dominion as having

equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedoms of speech and religion. Other lawyers and scholars who also endorse the moral reading might well formulate the constitutional principles, even at a very general level, differently and less expansively than I just have however, and though this introductory chapter is meant to explain and defend the moral reading, not my own interpretations under it, I should say something about how the choice among competing formulations should be made.

Of course the moral reading is not appropriate to everything a constitution contains. The American Constitution includes a great many clauses that are neither particularly abstract nor drafted in the language of moral principle. Article II specifies, for example, that the President must be at least thirty-five years old, and the Third Amendment insists that government may not quarter soldiers in citizens' houses in peacetime. The latter may have been inspired by a moral principle: those who wrote and enacted it might have been anxious to give effect to some principle protecting citizens' rights to privacy, for example. But the Third Amendment is not itself a moral principle: its *content* is not a general principle of privacy. So the first challenge to my own interpretation of the abstract clauses might be put this way. What argument or evidence do I have that the equal protection clause of the Fourteenth Amendment (for example), which declares that no state may deny any person equal protection of the laws, has a moral principle as *its* content though the Third Amendment does not?

This is a question of interpretation or, if you prefer, translation. We must try to find language of our own that best captures, in terms we find clear, the content of what the "framers" intended it to say. (Constitutional scholars use the word "framers" to describe, somewhat ambiguously, the various people who drafted and enacted a constitutional provision.) History is crucial to that project, because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did. We find nothing in history, however, to cause us any doubt about what the framers of the Third Amendment meant to say. Given the words they used, we cannot sensibly interpret them as laying down any moral principle at all, even if we believe they were inspired by one. They said what the words they used would normally be

used to say: not that privacy must be protected, but that soldiers must not be quartered in houses in peacetime. The same process of reasoning—about what the framers presumably intended to say when they used the words they did—yields an opposite conclusion about the framers of the equal protection clause, however. Most of them no doubt had fairly clear expectations about what legal consequences the Fourteenth Amendment would have. They expected it to end certain of the most egregious Jim Crow practices of the Reconstruction period. They plainly did not expect it to outlaw official racial segregation in school—on the contrary, the Congress that adopted the equal protection clause itself maintained segregation in the District of Columbia school system. But they did not *say* anything about Jim Crow laws or school segregation or homosexuality or gender equality, one way or the other. They said that "equal protection of the laws" is required, which plainly describes a very general principle, not any concrete application of it.

The framers meant, then, to enact a general principle. But which general principle? That further question must be answered by constructing different elaborations of the phrase "equal protection of the laws," each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know. The qualification that each of these possibilities must be recognizable as a political *principle* is absolutely crucial. We cannot capture a statesman's efforts to lay down a general constitutional principle by attributing to him something neither he nor we could recognize as a candidate for that role. But the qualification will typically leave many possibilities open. It was once debated, for example, whether the framers intended to stipulate, in the equal protection clause, only the relatively weak political principle that laws must be enforced in accordance with their terms, so that legal benefits conferred on everyone, including blacks, must not be denied, in practice, to anyone.

History seems decisive that the framers of the Fourteenth Amendment did not mean to lay down only so weak a principle as that one, however, which would have left states free to discriminate against blacks in any way they wished so long as they did so openly. Congressmen of the victorious nation, trying to capture the achievements and lessons of a terrible war, would be very unlikely to settle for anything so limited and insipid, and we should not take them to have done so unless the language leaves no other interpretation plausible. In any case, constitutional interpretation must take into account past legal and political practice as well as what the

framers themselves intended to say, and it has now been settled by unchallengeable precedent that the political principle incorporated in the Fourteenth Amendment is not that very weak one, but something more robust. Once that is conceded, however, then the principle must be something *much* more robust, because the only alternative, as a translation of what the framers actually *said* in the equal protection clause, is that they declared a principle of quite breathtaking scope and power: the principle that government must treat everyone as of equal status and with equal concern.

The substantive examples of later chapters give more detail to that sketchy explanation of the role of history and language in deciding what the Constitution means. But even this brief discussion has mentioned two important restraints that sharply limit the latitude the moral reading gives to individual judges. First, under that reading constitutional interpretation must begin in what the framers said, and, just as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak, so does our understanding of what the framers said. History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did, for example; their purpose, in that sense, is not part of our study. That is a crucial distinction, as we shall see in Chapter 3 and elsewhere. We are governed by what our lawmakers said—by the principles they laid down—not by any information we might have about how they themselves would have interpreted those principles or applied them in concrete cases.

Second, and equally important, constitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional *integrity* that is discussed at several points in the book and illustrated in, for example, Chapter 4.⁶ Judges may not read their own convictions into the Constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest. (I have elsewhere said that judges are like authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole.)⁷

Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth, or collective ownership of productive resources, a constitutional requirement, because that interpretation simply does not fit American history or practice, or the rest of the Constitution.

Nor could a judge plausibly think that the constitutional structure commits any but basic, structural political rights to his care. He might think that a society truly committed to equal concern would award people with handicaps special resources, or would secure convenient access to recreational parks for everyone, or would provide heroic and experimental medical treatment, no matter how expensive or speculative, for anyone whose life might possibly be saved. But it would violate constitutional integrity for a judge to treat these mandates as part of constitutional law. Judges must defer to general, settled understandings about the character of the power the Constitution assigns them. The moral reading asks them to find the best conception of constitutional moral principles—the best understanding of what equal moral status for men and women really requires, for example—that fits the broad story of America's historical record. It does not ask them to follow the whisperings of their own consciences or the traditions of their own class or sect if these cannot be seen as embedded in that record. Of course judges can abuse their power—they can pretend to observe the important restraint of integrity while really ignoring it. But generals and presidents and priests can abuse their powers, too. The moral reading is a strategy for lawyers and judges acting in good faith, which is all any interpretive strategy can be.

I emphasize these constraints of history and integrity, because they show how exaggerated is the common complaint that the moral reading gives judges absolute power to impose their own moral convictions on the rest of us. Macauley was wrong when he said that the American Constitution is all sail and no anchor,⁸ and so are the other critics who say that the moral reading turns judges into philosopher-kings. Our constitution is law, and like all law it is anchored in history, practice, and integrity. Most cases at law—even most constitutional cases—are not hard cases. The ordinary craft of a judge dictates an answer and leaves no room for the play of personal moral conviction. Still, we must not exaggerate the drag of that anchor. Very different, even contrary, conceptions of a constitutional principle—of what treating men and women as equals really means, for example—will often fit language, precedent, and practice well enough to pass these tests, and thoughtful judges must then decide on their own which conception does most credit to the nation. So though the familiar complaint that the

moral reading gives judges unlimited power is hyperbolic, it contains enough truth to alarm those who believe that such judicial power is inconsistent with a republican form of government. The constitutional sail is a broad one, and many people do fear that it is too big for a democratic boat.

What Is the Alternative?

Constitutional lawyers and scholars have therefore been anxious to find other strategies for constitutional interpretation, strategies that give judges less power. They have explored two different possibilities, and I discuss both later in this book. The first, and most forthright, concedes that the moral reading is right—that the Bill of Rights can only be understood as a set of moral principles. But it denies that judges should have the final authority themselves to conduct the moral reading—that they should have the last word about, for example, whether women have a constitutional right to choose abortion or whether affirmative action treats all races with equal concern. It reserves that interpretive authority to the people. That is by no means a contradictory combination of views. The moral reading, as I said, is a theory about what the Constitution means, not a theory about whose view of what it means must be accepted by the rest of us.

This first alternate offers a way of understanding the arguments of a great American judge, Learned Hand, whom I discuss in Chapter 17. Hand thought that the courts should take final authority to interpret the Constitution only when this is absolutely necessary to the survival of government—only when the courts must be referees between the other departments of government because the alternative would be a chaos of competing claims to jurisdiction. No such necessity compels courts to test legislative acts against the Constitution's moral principles, and Hand therefore thought it wrong for judges to claim that authority. Though his view was once an open possibility, history has long excluded it; practice has now settled that courts do have a responsibility to declare and act on their best understanding of what the Constitution forbids.⁹ If Hand's view had been accepted, the Supreme Court could not have decided, as it did in its famous *Brown* decision in 1954, that the equal protection clause outlaws racial segregation in public schools. In 1958 Hand said, with evident regret, that he had to regard the *Brown* decision as wrong, and he would have had to take the same view about later Supreme Court decisions that expanded racial equality, religious independence, and personal freedoms such as the freedom to buy and use contraceptives. These deci-

sions are now almost universally thought not only sound but shining examples of our constitutional structure working at its best.

The first alternative strategy, as I said, accepts the moral reading. The second alternative, which is called the "originalist" or "original intention" strategy, does not. The moral reading insists that the Constitution means what the framers intended to say. Originalism insists that it means what they expected their language to *do*, which as I said is a very different matter. (Though some originalists, including one of the most conservative justices now on the Supreme Court, Antonin Scalia, are unclear about the distinction.)¹⁰ According to originalism, the great clauses of the Bill of Rights should be interpreted not as laying down the abstract moral principles they actually describe, but instead as referring, in a kind of code or disguise, to the framers' own assumptions and expectations about the correct application of those principles. So the equal protection clause is to be understood as commanding not equal status but what the framers themselves thought was equal status, in spite of the fact that, as I said, the framers clearly meant to lay down the former standard not the latter one. The *Brown* decision I just mentioned crisply illustrates the distinction. The Court's decision was plainly required by the moral reading, because it is obvious now that official school segregation is not consistent with equal status and equal concern for all races. But the originalist strategy, consistently applied, would have demanded the opposite conclusion, because, as I said, the authors of the equal protection clause did not believe that school segregation, which they practiced themselves, was a denial of equal status, and did not expect that it would one day be deemed to be so. The moral reading insists that they misunderstood the moral principle that they themselves enacted into law. The originalist strategy would translate that mistake into enduring constitutional law.

That strategy, like the first alternative, would condemn not only the *Brown* decision but many other Supreme Court decisions that are now widely regarded as paradigms of good constitutional interpretation. For that reason, almost no one now embraces the originalist strategy in anything like a pure form. Even Robert Bork, who remains one of its strongest defenders, qualified his support in the Senate hearings following his nomination to the Supreme Court—he conceded that the *Brown* decision was right, and said that even the Court's 1965 decision guaranteeing a right to use contraceptives, which we have no reason to think the authors of any pertinent constitutional clause either expected or would have approved, was right in its result. The originalist strategy is as indefensible in principle

as it is unpalatable in result, moreover. It is as illegitimate to substitute a concrete, detailed provision for the abstract language of the equal protection clause as it would be to substitute some abstract principle of privacy for the concrete terms of the Third Amendment, or to treat the clause imposing a minimum age for a President as enacting some general principle of disability for persons under that age.

So though many conservative politicians and judges have endorsed originalism, and some, like Hand, have been tempted to reconsider whether judges should have the last word about what the Constitution requires, there is in fact very little practical support for either of these strategies. Yet the moral reading is almost never explicitly endorsed, and is often explicitly condemned. If neither of the two alternatives I described is actually embraced by those who disparage the moral reading, what alternative do they have in mind? The surprising answer is: none. Constitutional scholars often say that we must avoid the mistakes of both the moral reading, which gives too much power to judges, and of originalism, which makes the contemporary Constitution too much the dead hand of the past. The right method, they say, is something in between which strikes the right balance between protecting essential individual rights and deferring to popular will. But they do not indicate what the right balance is, or even what kind of scale we should use to find it. They say that constitutional interpretation must take both history and the general structure of the Constitution into account as well as moral or political philosophy. But they do not say why history or structure, both of which, as I said, figure in the moral reading, should figure in some further or different way, or what that different way is, or what general goal or standard of constitutional interpretation should guide us in seeking a different interpretive strategy.¹¹

So though the call for an intermediate constitutional strategy is often heard, it has not been answered, except in unhelpful metaphors about balance and structure. That is extraordinary, particularly given the enormous and growing literature of American constitutional theory. If it is so hard to produce an alternative to the moral reading, why struggle to do so? One distinguished constitutional lawyer who insists that there must be an interpretive strategy somewhere between originalism and the moral reading recently announced, at a conference, that although he had not discovered it, he would spend the rest of his life looking. Why?

I have already answered that question. Lawyers assume that the disabilities that a constitution imposes on majoritarian political processes are antidemocratic, at least if these disabilities are enforced by judges, and the

moral reading seems to exacerbate the insult. If there is no genuine alternative to the moral reading in practice, however, and if efforts to find even a theoretical statement of an acceptable alternative have failed, we would do well to look again at that assumption. I shall argue, as I have already promised, that it is unfounded.

I said earlier that the theoretical argument among constitutional scholars and judges was never really about whether judges should change the Constitution or leave it alone. It was always about how the Constitution should be interpreted. Happily, in spite of the politicians' rhetoric, that is now generally recognized by constitutional scholars, and it is also generally recognized that the question of interpretation turns on a political controversy, because the only substantial objection to the moral reading, which takes the text seriously, is that it offends democracy. So the academic argument is widely thought to be about how far democracy can properly be compromised in order to protect other values, including individual rights. One side declares itself passionate for democracy and anxious to protect it, while the other claims to be more sensitive to the injustices that democracy sometimes produces. In many ways, however, this new view of the debate is as confused as the older one. I shall try to convince you to see the constitutional argument in entirely different terms: as a debate not about how far democracy should yield to other values, but about what democracy, accurately understood, really is.

The Majoritarian Premise

Democracy means government by the people. But what does that mean? No explicit definition of democracy is settled among political theorists or in the dictionary. On the contrary, it is a matter of deep controversy what democracy really is. People disagree about which techniques of representation, which allocation of power among local, state, and national governments, which schedule and pattern of elections, and which other institutional arrangements provide the best available version of democracy. But beneath these familiar arguments over the structures of democracy there lies, I believe, a profound philosophical dispute about democracy's fundamental *value* or *point*, and one abstract issue is crucial to that dispute, though this is not always recognized. Should we accept or reject what I shall call the majoritarian premise?

This is a thesis about the fair *outcomes* of a political process: it insists that political procedures should be designed so that, at least on important

matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection. That goal sounds very reasonable, and many people, perhaps without much reflection, have taken it to provide the very essence of democracy. They believe that the complex political arrangements that constitute the democratic process should be aimed at and tested by this goal: that the laws that the complex democratic process enacts and the policies that it pursues should be those, in the end, that the majority of citizens would approve.

The majoritarian premise does not deny that individuals have important moral rights the majority should respect. It is not necessarily tied to some collectivist or utilitarian theory according to which such rights are nonsense. In some political communities, however—in Great Britain, for example—the majoritarian premise has been thought to entail that the community should defer to the majority's view about what these individual rights are, and how they are best respected and enforced. It is sometimes said that Britain has no constitution, but that is a mistake. Britain has an unwritten as well as a written constitution, and part of the former consists in understandings about what laws Parliament should not enact. It is part of the British constitution, for example, that freedom of speech is to be protected. Until very recently, it has seemed natural to British lawyers, however, that no group except a political majority, acting through Parliament, should decide what that requirement means, or whether it should be altered or repealed, so that when Parliament's intention to restrict speech is clear, British courts have no power to invalidate what it has done. That is because the majoritarian premise, and the majoritarian conception of democracy it produces, have been more or less unexamined fixtures of British political morality for over a century.

In the United States, however, most people who assume that the majoritarian premise states the ultimate definition of and justification for democracy nevertheless accept that on some occasions the will of the majority should *not* govern. They agree that the majority should not always be the final judge of when its own power should be limited to protect individual rights, and they accept that at least some of the Supreme Court's decisions that overturned popular legislation, as the *Brown* decision did, were right. The majoritarian premise does not rule out exceptions of that kind, but it does insist that in such cases, even if some derogation from majoritarian government is overall justified, something morally regrettable has happened, a moral cost has been paid. The premise supposes, in other words,

that it is *always* unfair when a political majority is not allowed to have its way, so that even when there are strong enough countervailing reasons to justify this, the unfairness remains.

If we reject the majoritarian premise, we need a different, better account of the value and point of democracy. Later I will defend an account—which I call the constitutional conception of democracy—that does reject the majoritarian premise. It denies that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational. It takes the defining aim of democracy to be a different one: that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect. This alternate account of the aim of democracy, it is true, demands much the same structure of government as the majoritarian premise does. It requires that day-to-day political decisions be made by officials who have been chosen in popular elections. But the constitutional conception requires these majoritarian procedures out of a concern for the equal status of citizens, and not out of any commitment to the goals of majority rule. So it offers no reason why some nonmajoritarian procedure should not be employed on special occasions when this would better protect or enhance the equal status that it declares to be the essence of democracy, and it does not accept that these exceptions are a cause of moral regret.

The constitutional conception of democracy, in short, takes the following attitude to majoritarian government. Democracy means government subject to conditions—we might call these the “democratic” conditions—of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to other procedures that protect and respect them better. The democratic conditions plainly include, for example, a requirement that public offices must in principle be open to members of all races and groups on equal terms. If some law provided that only members of one race were eligible for public office, then there would be no moral cost—no matter for moral regret at all—if a court that enjoyed the power to do so under a valid constitution struck down that law as unconstitutional. That would presumably be an occasion on which the majoritarian premise was flouted, but though this is a matter of regret according to the majoritarian

conception of democracy, it is not according to the constitutional conception. Of course, it may be controversial what the democratic conditions, in detail, really are, and whether a particular law does offend them. But, according to the constitutional conception, it would beg the question to object to a practice assigning those controversial questions for final decision to a court, on the ground that that practice is undemocratic, because that objection assumes that the laws in question respect the democratic conditions, and that is the very issue in controversy.

I hope it is now clear that the majoritarian premise has had a potent—if often unnoticed—grip on the imagination of American constitutional scholars and lawyers. Only that diagnosis explains the near unanimous view I described: that judicial review compromises democracy, so that the central question of constitutional theory must be whether and when that compromise is justified. That opinion is the child of a majoritarian conception of democracy, and therefore the grandchild of the majoritarian premise. It provokes the pointless search I described, for an interpretive strategy “intermediate” between the moral reading and originalism, and it tempts distinguished theorists into constructing Ptolemaic epicycles trying to reconcile constitutional practice with majoritarian principles.

So a complex issue of political morality—the validity of the majoritarian premise—is in fact at the heart of the long constitutional argument. The argument will remain confused until that issue is identified and addressed. We might pause to notice how influential the majoritarian premise has been in other important political debates, including the pressing national discussion about electoral campaign reform. This discussion has so far been dominated by the assumption that democracy is improved when it better serves the majoritarian premise—when it is designed more securely to produce collective decisions that match majority preferences. The unfortunate Supreme Court decision in *Buckley v. Valeo*, for example, which struck down laws limiting what rich individuals can spend on political campaigning, was based on a theory of free speech that has its origins in that view of democracy.¹² In fact the degeneration of democracy that has been so vivid in recent elections cannot be halted until we develop a more sophisticated view of what democracy means.

In most of the rest of this chapter I shall be evaluating arguments for and against the majoritarian premise. I shall not consider, however, but only mention now, one plainly inadequate argument for it that I fear has had considerable currency. This begins in a fashionable form of moral skepticism which insists that moral values and principles cannot be objectively

true, but only represent powerful concatenations of self-interest or taste, or of class or race or gender interest. If so, the argument continues, then judges who claim to have discovered moral truth are deluded, and the only fair political process is one that leaves power to the people. This argument is doubly fallacious. First, since its conclusion, favorable to the majoritarian premise, is itself a moral claim, it contradicts itself. Second, for reasons I have tried to explain elsewhere, the fashionable form of skepticism is incoherent.

In fact the most powerful arguments for the majoritarian premise are themselves arguments of political morality. They can be distinguished and grouped under the three eighteenth-century revolutionary virtues—equality, liberty, and community—and it is these more basic political ideas that we must now explore. If the premise can be sustained, this must be because it is endorsed by the best conception of at least one and perhaps all of these ideals. We must go behind democracy to consider, in the light of these deeper virtues and values, which conception of democracy—the majoritarian conception which is based on the majoritarian premise or the constitutional conception which rejects it—is sounder. But we shall first need another important distinction, and I shall make it now.

We the People

We say that in a democracy government is by the people; we mean that the people collectively do things—elect leaders, for example—that no individual does or can do alone. There are two kinds of collective action, however—statistical and communal—and our view of the majoritarian premise may well turn on which kind of collective action we take democratic government to require.

Collective action is statistical when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something *as* a group. We might say that yesterday the foreign exchange market drove down the price of the dollar. That is certainly a kind of collective action: only the combined action of a large group of bankers and dealers can affect the foreign currency market in any substantial way. But our reference to a collective entity, the currency market, does not point to any actual entity. We could, without changing our meaning, make an overtly statistical claim instead: that the combined effects of individual currency transactions were responsible for the lower price of the dollar at the latest trade.

Collective action is communal, however, when it cannot be reduced just to some statistical function of individual action, when it presupposes a special, distinct, collective *agency*. It is a matter of individuals acting together in a way that merges their separate actions into a further, unified, act that is together *theirs*. The familiar but emotionally powerful example of collective guilt provides a useful illustration. Many Germans (including those born after 1945) feel responsible for what Germany did, not just for what other Germans did. Their sense of responsibility assumes that they are themselves connected to the Nazi terror in some way, because they belong to the nation that committed those crimes. Here is a more pleasant example. An orchestra can play a symphony, though no single musician can, but this is not a case of merely statistical collective action because it is essential to a successful orchestral performance not just that each musician plays some appropriate score, timing his performance as the conductor instructs, but that the musicians play *as* an orchestra, each intending to make a contribution to the performance of the group, and each taking part in a collective responsibility for it. The performance of a football team can be communal collective action in the same way.

I have already distinguished two conceptions of democracy: majoritarian and constitutional. The first accepts and the second rejects the majoritarian premise. The difference between statistical and communal collective action allows us to draw a second distinction, this time between two readings of the idea that democracy is government by "the people." (I shall shortly consider the connection between these two distinctions.) The first reading is a statistical one: that in a democracy political decisions are made in accordance with the votes or wishes of some function—a majority or plurality—of individual citizens. The second is a communal reading: that in a democracy political decisions are taken by a distinct entity—the people *as such*—rather than by any set of individuals one by one. Rousseau's idea of government by general will is an example of a communal rather than a statistical conception of democracy. The statistical reading of government by the people is much more familiar in American political theory. The communal reading sounds mysterious, and may also sound dangerously totalitarian. If so, my reference to Rousseau will not have allayed the suspicion. I shall argue in the next two sections, however, that the supposedly most powerful arguments for the majoritarian premise presuppose the communal reading. They presuppose but betray it.

Does Constitutionalism Undermine Liberty?

The majoritarian premise insists that something of moral importance is lost or compromised whenever a political decision contradicts what the majority of citizens would prefer or judge right if they reflected on the basis of adequate information. We must try to identify that moral cost. What is lost or compromised? Many people think the answer is: equality. I shall consider that apparently natural answer shortly, but I begin with a different suggestion, which is that when constitutional disabling provisions, like those found in the Bill of Rights, limit what a majority can enact, the result is to compromise the community's freedom.¹³

That suggestion plainly appeals to what Isaiah Berlin and others have called positive as distinct from negative liberty, and what Benjamin Constant described as the liberty of the ancients as distinct from that of the moderns. It is the kind of freedom that statesmen and revolutionaries and terrorists and humanitarians have in mind when they insist that freedom must include the right of "self-determination" or the right of the "people" to govern themselves. Since the suggestion that constitutional rights compromise freedom appeals to positive rather than negative liberty, it might be said to pit the two kinds of liberty against each other. Constitutionalism, on this view, protects "negative" liberties, like free speech and "privacy," at the cost of the "positive" freedoms of self-determination.

This means, however, that this argument from liberty we are considering must be based on a communal rather than a statistical reading of government by the "people." On the statistical reading, an individual's control over the collective decisions that affect his life is measured by his power, on his own, to influence the result, and in a large democracy the power of any individual over national decisions is so tiny that constitutional restraints cannot be thought to diminish it enough to count as objectionable for that reason. On the contrary, constraints on majority will might well expand any particular individual's control of his own fate. On the communal reading, however, liberty is a matter not of any relation between government and citizens one by one, but rather of the relation between government and the whole citizenry understood collectively. Positive liberty, so understood, is the state of affairs when "the people" rule their officials, at least in the final analysis, rather than vice versa, and that is the liberty said to be compromised when the majority is prevented from securing its will.

I discuss this defense of the majoritarian premise first because it is emotionally the most powerful. Self-determination is the most potent—

and dangerous—political ideal of our time. People fervently want to be governed by a group not just to which they belong, but with which they identify in some particular way. They want to be governed by members of the same religion or race or nation or linguistic community or historical nation-state rather than by any other group, and they regard a political community that does not satisfy this demand as a tyranny, no matter how otherwise fair and satisfactory it is.

This is partly a matter of narrow self-interest. People think that decisions made by a group most of whose members share their values will be better decisions for them. The great power of the ideal lies deeper, however. It lies in half-articulate convictions about when people are free, because they govern themselves, in spite of the fact that in a statistical sense, as individuals, they are not free, because they must often bend to the will of others. For us moderns, the key to this liberty of the ancients lies in democracy. As John Kenneth Galbraith has said, "When people put their ballots in the boxes, they are, by that act, inoculated against the feeling that the government is not theirs. They then accept, in some measure, that its errors are their errors, its aberrations their aberrations, that any revolt will be against them."¹⁴ We think we are free when we accept a majority's will in place of our own, but not when we bow before the doom of a monarch or the ukase of any aristocracy of blood or faith or skill. It is not difficult to see the judiciary as an aristocracy claiming dominion. Learned Hand described judges who appeal to the moral reading of the Constitution as "a bevy of Platonic guardians," and said he could not bear to be ruled by such a body of elites even if he knew how to select those fit for the task.¹⁵

But powerful as the idea of democratic self-governance is, it is also deeply mysterious. Why am I *free*—how could I be thought to be governing *myself*—when I must obey what other people decide even if I think it wrong or unwise or unfair to me and my family? What difference can it make how many people must think the decision right and wise and fair if it is not necessary that I do? What kind of freedom is that? The answer to these enormously difficult questions begins in the communal conception of collective action. If I am a genuine member of a political community, its act is in some pertinent sense my act, even when I argued and voted against it, just as the victory or defeat of a team of which I am a member is my victory or defeat even if my own individual contribution made no difference either way. On no other assumption can we intelligibly think that as members of a flourishing democracy we are governing ourselves.

That explanation may seem only to deepen the mystery of collective self-government, however, because it appeals to two further ideas that seem dark themselves. What could *genuine* membership in a political community mean? And in what sense *can* a collective act of a group also be the act of each member? These are moral rather than metaphysical or psychological questions: they are not to be answered by counting the ultimate constituents of reality or discovering when people feel responsible for what some group that they belong to does. We must describe some connection between an individual and a group that makes it *fair* to treat him—and *sensible* that he treat himself—as responsible for what it does. Let us bring those ideas together in the concept of moral membership, by which we mean the kind of membership in a political community that engages self-government. If true democracy is government by the people, in the communal sense that provides self-government, then true democracy is based on moral membership.

In this section we are considering the argument that the moral cost incurred when the majoritarian premise is flouted is a cost in liberty. We have now clarified that argument: we must understand it to mean that the people govern themselves when the majoritarian premise is satisfied, and that any compromise of that premise compromises that self-government. But that majoritarianism does not guarantee self-government unless all the members of the community in question are moral members, and the majoritarian premise acknowledges no such qualification. German Jews were not moral members of the political community that tried to exterminate them, though they had votes in the elections that led to Hitler's Chancellorship, and the Holocaust was therefore not part of their self-government, even if a majority of Germans would have approved it. Catholics in Northern Ireland, nationalists in the Caucasus, and separatists in Quebec all believe they are not free because they are not moral members of the right political community. I do not mean that people who deny moral membership in their political community are always right. The test, as I said, is moral not psychological. But they are not wrong just because they have an equal vote with others in some standing majoritarian structure.

When I described the constitutional conception of democracy earlier, as a rival to the majoritarian conception that reflects the majoritarian premise, I said that the constitutional conception presupposes democratic conditions. These are the conditions that must be met before majoritarian decision-making can claim any automatic moral advantage over other procedures for collective decision. We have now identified the same idea

through another route. The democratic conditions are the conditions of moral membership in a political community. So we can now state a strong conclusion: not just that positive liberty is not sacrificed whenever and just because the majoritarian premise is ignored, but that positive liberty is enhanced when that premise is rejected outright in favor of the constitutional conception of democracy. If it is true that self-government is possible only within a community that meets the conditions of moral membership, because only then are we entitled to refer to government by "the people" in a powerful communal rather than a barren statistical sense, we need a conception of democracy that insists that no democracy exists unless those conditions are met.

What are the conditions of moral membership, and hence of positive freedom, and hence of democracy on the constitutional conception? I have tried to describe them elsewhere, and will only summarize my conclusions here.¹⁶ There are two kinds of conditions. The first set is *structural*: these conditions describe the character the community as a whole must have if it is to count as a genuine political community. Some of these structural conditions are essentially historical. The political community must be more than nominal: it must have been established by a historical process that has produced generally recognized and stable territorial boundaries. Many sociologists and political scientists and politicians would add further structural conditions to that very limited one: they would insist, for example, that the members of a genuine political community must share a culture as well as a political history: that they must speak a common language, have common values, and so forth. Some might add further psychological conditions: that members of the community must be mainly disposed to trust one another, for example.¹⁷ I shall not consider the interesting issues these suggestions raise here, because our interest lies in the second set of conditions.

These are *relational* conditions: they describe how an individual must be treated by a genuine political community in order that he or she be a moral member of that community. A political community cannot count anyone as a moral member unless it gives that person a *part* in any collective decision, a *stake* in it, and *independence* from it. First, each person must have an opportunity to make a difference in the collective decisions, and the force of his role—the magnitude of the difference he can make—must not be structurally fixed or limited in ways that reflect assumptions about his worth or talent or ability, or the soundness of his convictions or tastes. It is that condition that insists on universal suffrage and effective elections and representation, even though it does not demand that these be the only avenues of

collective decision. It also insists, as several of the chapters in Part III argue, on free speech and expression for all opinion, not just on formal political occasions, but in the informal life of the community as well.

It insists, moreover, on interpreting the force of freedom of speech and expression by concentrating on the role of that freedom in the processes of self-government, a role that dictates different answers to several questions—including the question of whether campaign expenditure limits violate that freedom—than a majoritarian conception of democracy would.

Second, the political process of a genuine community must express some bona fide conception of equal concern for the interests of all members, which means that political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all. Moral membership involves reciprocity: a person is not a member unless he is treated as a member by others, which means that they treat the consequences of any collective decision for his life as equally significant a reason for or against that decision as are comparable consequences for the life of anyone else. So the communal conception of democracy explains an intuition many of us share: that a society in which the majority shows contempt for the needs and prospects of some minority is illegitimate as well as unjust.

The third condition—of moral independence—is likely to be more controversial than these first two. I believe it essential, however, in order to capture an aspect of moral membership that the first two conditions may be interpreted to omit. The root idea we are now exploring—that individual freedom is furthered by collective self-government—assumes that the members of a political community can appropriately regard themselves as partners in a joint venture, like members of a football team or orchestra in whose work and fate all share, even when that venture is conducted in ways they do not endorse. That idea is nonsense unless it can be accepted by people with self-respect, and whether it can be depends on which kinds of decisions the collective venture is thought competent to make. An orchestra's conductor can decide, for example, how the orchestra will interpret a particular piece: there must be a decision of that issue binding on all, and the conductor is the only one placed to make it. No musician sacrifices anything essential to his control over his own life, and hence to his self-respect, in accepting that someone else has that responsibility, but it would plainly be otherwise if the conductor tried to dictate not only how a violinist should play under his direction, but what standards of taste the

and these would mean the end, not the triumph, of deliberation in our politics.

We must begin again. Political equality, on the statistical model of collective action, must be defined as a matter not of power but of the kind of *status* I discussed in connection with the conditions of democratic self-government. Male-only suffrage and university votes were inequalitarian because they presupposed that some people were worthier or better fit to participate in collective decisions than others. But mere political authority—the power attached to political office for which all are in principle eligible—carries no such presupposition. That is why the special power of political officials does not destroy true political equality, and it does not matter, for that point, whether or not the officials are directly elected. Many officials who are appointed rather than elected wield great power. An acting ambassador to Iraq can create a Gulf War and the chairman of the Federal Reserve Board can bring the economy to its knees. There is no inequalitarian premise of status—no supposition of first- and second-class citizenship—in the arrangements that produce this power. Nor is there any inequalitarian premise in the parallel arrangements that give certain American judges, appointed and approved by elected officials, authority over constitutional adjudication.

So the statistical reading of collective political action makes little sense of the idea that political equality is compromised whenever majority will is thwarted. And that idea is silly anyway, if we have the statistical reading in mind. In a large, continental democracy, any ordinary citizen's political power is minuscule, on any understanding of what political power is, and the diminution of that individual power traceable to constitutional constraints on majority will is more minuscule still. The egalitarian argument for the majoritarian premise seems initially more promising, however, if we detach it from the statistical reading of collective action and recast it from the perspective of the communal reading. From that perspective, equality is not a matter of any relation among citizens one by one, but rather a relation between the citizenry, understood collectively as "the people," and their governors. Political equality is the state of affairs in which the people rule their officials, in the final analysis, rather than vice versa. This provides a less silly argument for the proposition that judicial review or other compromises of the majoritarian premise damage political equality. It might be said that when judges apply constitutional provisions to strike down legislation that the people, through their representatives, have enacted, the people are no longer in charge.

But this argument is exactly the same as the argument considered in the last section: it appeals, once again, to the ideals of political self-determination. Positive liberty and the sense of equality that we extracted from the communal understanding of "we the people" are the very same virtues. (That is hardly surprising, since liberty and equality are, in general, aspects of the same ideal, not, as is often supposed, rivals.)¹⁹ The objections I described in the last section, which are fatal to any attempt to ground a majoritarian premise in positive liberty, are also decisive against the same argument when it cries equality instead.

Community?

In recent years opponents of the moral reading have begun to appeal to the third revolutionary virtue—community (or fraternity)—rather than to either liberty or equality. They argue that because the moral reading assigns the most fundamental political decisions to an elite legal profession, it weakens the public's sense of community and cheats it of its sense of common adventure. But "community" is used in different senses, to refer to very different emotions or practices or ideals, and it is important to notice which of these is in play in this kind of argument. It is patently true, as philosophers since Aristotle have agreed, that people have an interest in sharing projects, language, entertainment, assumptions, and ambitions with others. A good political community will of course serve that interest,²⁰ but many people's interest in community will be better served by other, nonpolitical communities such as religious and professional and social groups. The disabling clauses of the American Constitution do not limit or impair people's power to form and share such communities; on the contrary, some constraints, like the First Amendment's protection of association and its prohibition against religious discrimination, enhance that power. The communitarians and others who appeal to community to support the majoritarian premise have something rather different in mind, however. They have in mind not the general benefits of close human relations, which can be secured in many different forms of community, but the special benefits they believe follow, both for people as individuals and for the political society as a whole, when citizens are actively engaged in political activity in a certain spirit.

That is not the spirit recommended by a different tradition of political scientists who regard politics as commerce by other means, an arena where citizens pursue their own advantage through political action groups and

special interest politics. Communitarians think that this “interest-group republicanism” is a perversion of the republican ideal. They want people to participate in politics as moral agents promoting not their own partisan interests but rival conceptions of the public good. They suppose that if genuine deliberative democracy of that kind can be realized, not only will collective decisions be better, but citizens will lead better—more virtuous, fulfilled, and satisfying—lives.

Communitarians insist that this goal is jeopardized by judicial review, particularly when judicial review is as expansive as the moral reading invites it to be. But they rely on a dubious though rarely challenged assumption: that public discussion of constitutional justice is of better quality and engages more people in the deliberative way the communitarians favor if these issues are finally decided by legislatures rather than courts. This assumption may be inaccurate for a large number of different reasons. There is plainly no necessary connection between the impact that a majoritarian process gives each potential voter and the influence that voter has over a political decision. Some citizens may have more influence over a judicial decision by their contribution to a public discussion of the issue than they would have over a legislative decision just through their solitary vote. Even more important, there is no necessary connection between a citizen’s political impact or influence and the ethical benefit he secures through participating in public discussion or deliberation. The quality of the discussion might be better, and his own contribution more genuinely deliberative and public spirited, in a general public debate preceding or following a judicial decision than in a political battle culminating in a legislative vote or even a referendum.

The interaction between these different phenomena—impact, influence, and ethically valuable public participation—is a complex empirical matter. In some circumstances, as I just suggested, individual citizens may be able to exercise the moral responsibilities of citizenship better when final decisions are removed from ordinary politics and assigned to courts, whose decisions are meant to turn on principle, not on the weight of numbers or the balance of political influence. I discuss the reasons why this may be so in Chapter 17, and so will only summarize them here. Although the political process that leads to a legislative decision may be of very high quality, it very often is not, as the recent debates in the United States about health care reform and gun control show. Even when the debate is illuminating, moreover, the majoritarian process encourages compromises that may subordinate important issues of principle. Constitutional legal cases,

by contrast, can and do provoke a widespread public discussion that focuses on political morality. The great American debate about civil rights and affirmative action, which began in the 1950s and continues today, may well have been more deliberative because the issues were shaped by adjudication, and the argument over *Roe v. Wade*, discussed in Part I, for all its bitterness and violence, may have produced a better understanding of the complexity of the moral issues than politics alone would have provided.

I put the suggestion that judicial review may provide a superior kind of republican deliberation about some issues tentatively, as a possibility, because I do not believe that we have enough information for much confidence either way. I emphasize the possibility, nevertheless, because the communitarian argument simply ignores it, and assumes, with no pertinent evidence, that the only or most beneficial kind of “participation” in politics is the kind that looks toward elections of representatives who will then enact legislation. The character of recent American elections, and of contemporary national and local legislative debate and deliberation, hardly makes that assumption self-evident. Of course we should aim to improve ordinary politics, because broad-based political activity is essential to justice as well as dignity. (Rethinking what democracy means is, as I said, an essential part of that process.) But we must not pretend, when we evaluate the impact of judicial review on deliberative democracy, that what should happen has happened. In any case, however, as I emphasize in Chapter 17, whether great constitutional issues provoke and guide public deliberation depends, among much else, on how these issues are conceived and addressed by lawyers and judges. There is little chance of a useful national debate over constitutional principle when constitutional decisions are considered technical exercises in an arcane and conceptual craft. The chances would improve if the moral reading of the Constitution were more openly recognized by and in judicial opinions.

I do not mean, of course, that only judges should discuss matters of high political principle. Legislatures are guardians of principle too, and that includes constitutional principle.²¹ The argument of this section aims only to show why the ideal of community does not support the majoritarian premise, or undermine the moral reading, any more effectively than do liberty and equality, the two senior members of the revolutionary brigade. We must set the majoritarian premise aside, and with it the majoritarian conception of democracy. It is not a defensible conception of what true democracy is, and it is not America’s conception.

What Follows?

In a decent working democracy, like the United States, the democratic conditions set out in the Constitution are sufficiently met in practice so that there is no unfairness in allowing national and local legislatures the powers they have under standing arrangements. On the contrary, democracy would be extinguished by any general constitutional change that gave an oligarchy of unelected experts power to overrule and replace any legislative decision they thought unwise or unjust. Even if the experts always improved the legislation they rejected—always stipulated fairer income taxes than the legislature had enacted, for example—there would be a loss in self-government which the merits of their decisions could not extinguish. It is different, however, when the question is plausibly raised whether some rule or regulation or policy itself undercuts or weakens the democratic character of the community, and the constitutional arrangement assigns *that* question to a court. Suppose the legislature enacts a law making it a crime for someone to burn his own American flag as an act of protest.²² Suppose this law is challenged on the ground that it impairs democratic self-government, by wrongly constricting the liberty of speech, and a court accepts this charge and strikes down the law. If the court's decision is correct—if laws against flag-burning do in fact violate the democratic conditions set out in the Constitution as these have been interpreted and formed by American history—the decision is not anti-democratic, but, on the contrary, improves democracy. No moral cost has been paid, because no one, individually or collectively, is worse off in any of the dimensions we have now canvassed. No one's power to participate in a self-governing community has been worsened, because everyone's power in that respect has been improved. No one's equality has been compromised, because equality, in the only pertinent sense, has been strengthened. No one has been cheated of the ethical advantages of a role in principled deliberation if he or she had a chance to participate in the public discussion about whether the decision was right. If the court had not intervened—if the legislature's decision had been left standing—everyone would have been worse off, in all the dimensions of democracy, and it would be perverse to regard that as in any way or sense a democratic victory. Of course, if we assume that the court's decision was wrong, then none of this is true. Certainly it impairs democracy when an authoritative court makes the wrong decision about what the democratic conditions require—but no more than it does when a majoritarian legislature makes

a wrong constitutional decision that is allowed to stand. The possibility of error is symmetrical. So the majoritarian premise is confused, and it must be abandoned.

These are important conclusions. They show the fallacy in the popular argument that since judicial review of legislation is undemocratic the moral reading, which exacerbates the damage to democracy, should be rejected. But it is crucial to realize the limits of our conclusions. We do not yet have a positive argument in *favor* of judicial review, either in the form that institution has taken in the United States or in any other form. We have simply established a level playing field on which the contest between different institutional structures for interpreting the democratic conditions must take place, free from any default or presupposition whatsoever. The real, deep difficulty the constitutional argument exposes in democracy is that it is a procedurally *incomplete* scheme of government. It cannot prescribe the procedures for testing whether the conditions for the procedures it does prescribe are met.

How should a political community that aims at democracy decide whether the conditions democracy requires are met? Should it have a written constitution as its most fundamental law? Should that constitution describe a conception of the democratic conditions in as great detail as possible, trying to anticipate, in a constitutional code, all issues that might arise? Or should it set out very abstract statements of the democratic conditions, as the American Constitution and many other contemporary constitutions do, and leave it to contemporary institutions to interpret these generation by generation? If the latter, which institutions should these be? Should they be the ordinary, majoritarian parliamentary institutions, as the British constitution has for so long insisted? Or should they be special constitutional chambers, whose members are elected but perhaps for much longer terms or in different ways than the ordinary parliamentarians are? Or should they consist in a hierarchy of courts, as John Marshall declared natural in *Marbury v. Madison*?

A community might combine these different answers in different ways. The United States Constitution, as we noticed, combines very specific clauses, about quartering soldiers in peacetime, for example, with the majestically abstract clauses this book mainly discusses. It is settled in the United States that the Supreme Court does have authority to hold legislation invalid if it deems it unconstitutional. But of course that does not deny that legislators have a parallel responsibility to make constitutional judgments themselves, and to refuse to vote for laws they think unconstitu-

tional. Nor does it follow, when courts have power to enforce some constitutional rights, that they have power to enforce them all. Some imaginative American constitutional lawyers argue, for example, that the power of the federal courts to declare the acts of other institutions invalid because unconstitutional is limited: they have power to enforce many of the rights, principles, and standards the Constitution creates, on this view, but not all of them.²³

The moral reading is consistent with all these institutional solutions to the problem of democratic conditions. It is a theory about how certain clauses of some constitutions should be read—about what questions must be asked and answered in deciding what those clauses mean and require. It is not a theory about who must ask these questions, or about whose answer must be taken to be authoritative. So the moral reading is only part, though it is an important part, of a general theory of constitutional practice. What shall we say about the remaining questions, the institutional questions the moral reading does not reach?

I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding them. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions. A host of practical considerations are relevant, and many of these may argue forcefully for allowing an elected legislature itself to decide on the moral limits of its power. But other considerations argue in the opposite direction, including the fact that legislators are vulnerable to political pressures of manifold kinds, both financial and political, so that a legislature is not the safest vehicle for protecting the rights of politically unpopular groups. People can be expected to disagree about which structure is overall best, and so in certain circumstances they need a decision procedure for deciding that question, which is exactly what a theory of democracy cannot provide. That is why the initial making of a political constitution is such a mysterious matter, and why it seems natural to insist on supermajorities or even near unanimity then, not out of any conception of procedural fairness, but rather out of a sense that stability cannot otherwise be had.

The situation is different, however, when we are interpreting an established constitutional practice, not starting a new one. Then authority is already distributed by history, and details of institutional responsibility are matters of interpretation, not of invention from nothing. In these circumstances, rejecting the majoritarian premise means that we may look for the

best interpretation with a more open mind: we have no reason of principle to try to force our practices into some majoritarian mold. If the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority, and that they largely understand the Bill of Rights as a constitution of principle—if that best explains the decisions judges actually make and the public largely accepts—we have no reason to resist that reading and to strain for one that seems more congenial to a majoritarian philosophy.

Comments and Cautions

I have not revised the essays that make up the rest of this book, except to correct a few mistakes of reference. Hindsight is tempting, and in many cases I would put arguments, and especially predictions, differently now. Substantial revision would also have avoided much of the repetition that collecting essays inevitably generates. Arguments and examples sometimes appear in more than one essay (though they take different forms, and have been, I hope, improved over time). But most of the original essays have been commented on by others, and changing them now might cause confusion.

This is not in any sense a textbook on constitutional law. I discuss relatively few cases, and I do not attempt to prove my general claims by citations to secondary sources. Scholars and lawyers disagree about constitutional theory not because some of them have read more cases than others, or read them more carefully, but because they disagree about the philosophical and jurisprudential issues that I emphasize. So I discuss a few cases as illustrations of principles rather than attempting to derive principles from many cases.

Nor do I much discuss technical legal doctrine, except when this is absolutely necessary. Every part of law, including constitutional law, makes use of special invented devices and categories in an attempt to discipline abstract legal principles with a technical vocabulary. Principles resist such discipline, however, and the technical devices have a finite—often very short—shelf life. Each begins as a useful and modest strategy showing the implications of general principles for a limited set of problems. But some then develop a life and force of their own, and become aging tyrants whose patching and grooming is more trouble than it is worth, until they are finally dispatched—sans teeth, sans everything—by a creative judge with new devices. The apparatus of “strict,” “relaxed,” and

“intermediate” levels of “scrutiny,” which the Supreme Court has used for decades in its equal protection decisions, for example, once served a useful purpose by offering working presumptions about discriminations that did or did not signal likely failures of equal concern. It no longer does. This book neglects such doctrinal devices to concentrate on the underlying principles they are supposed to serve.

I should like, finally, to reply to an objection that has been made to my arguments before, and that I anticipate will be made again. It is said that the results I claim for the moral reading, in particular constitutional cases, magically coincide with those I favor politically myself. As one commentator has put it, my arguments always seem to have happy endings. Or, at any rate, liberal endings—my arguments tend to endorse the Supreme Court decisions that are generally regarded as liberal ones, and to reject, as mistakes, those generally seen as conservative. This is suspicious, it is said, because I insist that law is different from morality, and that legal integrity often prevents a lawyer from finding in the law what he wishes were there. Why, then, is the American Constitution, as I understand it, so uniform a triumph of contemporary liberal thought?

I should make plain, first, that my arguments do not by any means always support people or acts or institutions I admire or approve. Much of Part II defends pornographers, flag-burners, and Nazi marchers, and Part I defends a general right of abortion, though I believe, for reasons I have described in another book, that even early abortion is often an ethical mistake.²⁴ Nor do I read the Constitution to contain all the important principles of political liberalism. In other writings, for example, I defend a theory of economic justice that would require substantial redistribution of wealth in rich political societies.²⁵ Some national constitutions do attempt to stipulate a degree of economic equality as a constitutional right, and some American lawyers have argued that our Constitution can be understood to do so.²⁶ But I have not; on the contrary, I have insisted that integrity would bar any attempt to argue from the abstract moral clauses of the Bill of Rights, or from any other part of the Constitution, to any such result.

But though the objection is wrong in assuming that I find the Constitution to be exactly what I would wish, I mainly want to resist the objection’s other premise—that it is embarrassing for the moral reading when those who accept it find happy endings to their constitutional journeys. Of course my constitutional opinions are influenced by my own convictions of political morality. So are the opinions of lawyers who are more conser-

vative and more radical than I am. As Chapter 6 shows, conservative judges are much readier than political liberals to use the abstract moral language of the Fourteenth Amendment to strike down affirmative action programs, and the radical view of the First Amendment that Part II discusses is at least as much driven by political instincts as my liberal understanding is.

I not only concede but emphasize that constitutional opinion is sensitive to political conviction. Otherwise, as I said, we would not be able to classify jurists as conservative or moderate or liberal or radical with even the success we have. The question is rather whether the influence is disreputable. Constitutional politics has been confused and corrupted by a pretense that judges (if only they were not so hungry for power) could use politically neutral strategies of constitutional interpretation. Judges who join in that pretense try to hide the inevitable influence of their own convictions even from themselves, and the result is a costly mendacity. The actual grounds of decision are hidden from both legitimate public inspection and valuable public debate. The moral reading offers different counsel. It explains why fidelity to the Constitution and to law *demands* that judges make contemporary judgments of political morality, and it therefore encourages an open display of the true grounds of judgment, in the hope that judges will construct franker arguments of principle that allow the public to join in the argument.

So of course the moral reading encourages lawyers and judges to read an abstract constitution in the light of what they take to be justice. How else could they answer the moral questions that abstract constitution asks them? It is no surprise, or occasion for ridicule or suspicion, that a constitutional theory reflects a moral stance. It would be an occasion for surprise—and ridicule—if it did not. Only an unbelievably crude form of legal positivism—a form disowned by the foremost positivist of the century, Herbert Hart—could produce that kind of insulation.²⁷ Text and integrity do act as important constraints, as I have been emphasizing throughout this discussion. But though these constraints shape and limit the impact of convictions of justice, they cannot eliminate that impact. The moral reading insists, however, that this influence is not disreputable, so long as it is openly recognized, and so long as the convictions are identified and defended honestly, by which I mean through proper arguments of principle not just thin slogans or tired metaphors.

This book does indeed offer a liberal view of the American Constitution. It provides arguments of liberal principle and claims that these provide the

best interpretations of the constitutional tradition we have inherited and whose trustees we now are. I believe, and try to show, that liberal opinion best fits our constitutional structure, which was, after all, first constructed in the bright morning of liberal thought. My arguments can certainly be resisted. But I hope they will be resisted in the right way: by pointing out their fallacies or by deploying different principles—more conservative or more radical ones—and showing why these different principles are better because they are grounded in a superior morality, or are more practicable, or are in some other way wiser or fairer. It is too late for the old, cowardly, story about judges not being responsible for making arguments like these, or competent to do so, or that it is undemocratic for them to try, or that their job is to enforce the law, not speculate about morality. That old story is philosophy too, but it is bad philosophy. It appeals to concepts—of law and democracy—that it does not begin to understand.

It is in the nature of legal interpretation—not just but particularly constitutional interpretation—to aim at happy endings.²⁸ There is no alternative, except aiming at unhappy ones, because once the pure form of originalism is rejected there is no such thing as neutral accuracy. Telling it how it is means, up to a point, telling it how it should be. What is that point? The American constitutional novel includes, after all, the Supreme Court's *Dred Scott* decision, which treated slaves as a kind of property, and the Court's twentieth-century "rights of property" decisions, which nearly swamped Roosevelt's New Deal. How happy an overall view of that story is actually on offer? Many chapters raise that question, and it cannot be answered except through detailed interpretive arguments like those they provide. But political and intellectual responsibility, as well as cheerfulness, argue for optimism. The Constitution is America's moral sail, and we must hold to the courage of the conviction that fills it, the conviction that we can all be equal citizens of a moral republic. That is a noble faith, and only optimism can redeem it.

I

LIFE DEATH AND RACE
