

TABLE OF CONTENTS

	Introduction	1
1	Theories of Interpretation	20
2	The Inevitability of Choice	61
3	The Oath of Office	92
4	How to Choose	101
5	Traditions: “Athwart History, Yelling Stop”	132
6	Where to Stand	157

Acknowledgments 167

Index 169

The Constitution of the United States 175

Introduction

IN FEBRUARY 2021, I started a new job as Senior Counselor in the U.S. Department of Homeland Security. Before I began, I was required, or privileged, to take the oath of office. The United States was in the midst of the COVID-19 pandemic, and so I took the oath all by myself, online via my 2015 MacBook Air, in a little room in my home.

Here is what I was asked to say:

I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

Before I started, I thought to myself: This is a great honor, and it is just my laptop and me, and the single person administering the oath; *I will not cry*.

Reader, I cried.

Here's one reason. The house in which I took the oath is in Concord, Massachusetts. That house was built in 1763 by

Ephraim Wood, an active participant in the activities that led to the American Revolution. As I took the oath, I looked out on my front yard, where British soldiers came on April 19, 1775—the first day of the American Revolution.¹

Four years earlier, Wood had been chosen as chairman of Concord's selectmen, town clerk, and assessor and overseer of the poor. (Later he was reelected to those offices—seventeen times.) In 1773 he served on the committee that decided to protest the tax on tea. According to the Massachusetts Historical Commission, the Wood House, as it is called, is “one of the most important of Concord's early farmhouses.”² The house played a significant role in the Revolutionary War. Actually, it helped precipitate the fighting. It was one of the places where munitions were being held, which is what prompted the initial British invasion.

“In the weeks before April 19, 1775,” explains the Historical Commission, “when military stores were being sent inland to Concord for hiding, six of 35 barrels of powder and some bullets were hidden on Ephraim Wood's farm.” Hours before shots were fired, the British forces went to that farm, looking for the munitions and also for Wood. They didn't find him. Their plans were less secret than they thought, and Wood managed to escape, carrying munitions on his back.

On that critical day, British soldiers destroyed a lot of property, including every public store that they could find. But they didn't burn down or even damage Wood's house. Wood returned. As the fighting continued, became terrible, and then worse, the house remained intact. It was there before the

1. For a fuller description of the house and its history, on which I draw here, see Cass R. Sunstein, *Impeachment: A Citizen's Guide* (2017).

2. Quoted in Betsy Levinson, “Home Portrait: Country Charm Meets Modern Amenities,” *Wicked Local Concord*, October 5, 2015.

colonies turned into the United States, and it was there when Jefferson wrote the Declaration of Independence. Just a few months after Jefferson did that, Wood himself, a short distance from his house, helped write a document that called for a Constitutional Convention in Concord,³ resolving:

That the supreme Legislative, Either in their proper capacity or in Joint Committee are by no means a Body Proper to form & Establish a Constitution of form of Government for Reasones following viz—first Because we conceive that Constitution, in its proper idea intends a system of principals established to secure the subject in the Possession of, and enjoyment of their Rights & Privileges against any encroachment of the Governing Part.

Wood's group has been credited with inventing the whole idea of a convention for constitution-making. His house was there when the Articles of Confederation ruled the land, and it was there when the Federalist Papers were written and when the Constitution was ratified. It stands proudly today.

When I took the oath on my little laptop, there in the house that Ephraim Wood built back in 1763 and that survived the British invasion in 1775 and helped precipitate the Revolutionary War, I was keenly aware of all this (and so I might be forgiven for crying).

What did I take the oath to “support and defend”? In 1789, nearly two years after the Constitution had been written, James Jackson, a representative from Georgia, observed, “Our Constitution is like a vessel just launched, and lying at the wharf,

3. See Roger Sherman Hoar, “When Concord Invented the Constitutional Convention” (July 3, 1917), available at <http://constitutionathomeandabroad.blogspot.com/2012/05/when-concord-invented-constitutional.html?m=1>.

she is untried, and you can hardly discover any one of her properties.”⁴ That is one conception of the founding document, at least in the late eighteenth century, and perhaps even to some extent today. Far from being a system of specific rules and concrete commands, the Constitution can be seen as a vessel whose properties have been discovered (or created?) over a period of centuries. Those properties are still being discovered (and created).

Here are a few excerpts from the Constitution. Pause over the words, if you would, and try to read them as if they were new.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

No Bill of Attainder or ex post facto Law shall be passed.

The executive Power shall be vested in a President of the United States of America.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.

4. See Jonathan Gienapp, *The Second Creation* (2018), 1.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

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

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

What do these words mean? How shall we interpret them? Are they fixed and firm? Does their scope change over time? What room, if any, does the current generation—judges, politicians, all of us—have to give them meaning?

“Congress shall make no law . . . abridging the freedom of speech.” Do those words forbid Congress from punishing speakers if they incite people to commit federal crimes?

“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Does that mean that states must recognize same-sex marriages?

“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” Does that prohibit the government from requiring people to get a license to carry guns in public?

How do we go about answering such questions? What is our theory of interpretation? Do we have to have one?

The United States is in a period of constitutional upheaval, in which long-standing understandings are being jettisoned and new ones are taking their place. Before our eyes, something like a new Constitution is being born.

Some conservatives once spoke nostalgically and with firm resolve about “the Constitution in Exile.” That was the Constitution as it existed in the early 1930s, before Franklin Delano Roosevelt’s New Deal, the rise of the modern administrative state, and the emergence of a right to privacy, including the right to use contraceptives. In the early 1930s our institutions and our rights were dramatically different from what they are now. No Social Security Administration, no National Labor Relations Board, no Environmental Protection Agency—and no sex equality, let alone a right to same-sex marriage. The old Constitution, the critics claimed, was the real Constitution, and it was lost.

That old Constitution is coming out of exile. What we are seeing is, in important respects, in the nature of a regime change, or a paradigm shift. Any snapshot will rapidly go out of date, but consider the following:

- The right to choose abortion has been eliminated;
- The right to privacy, as such, is in deep trouble;
- The individual right to possess guns, first recognized in 2008, is being expanded;
- The rights of religious believers are rapidly growing;
- Affirmative action is on its heels, and it might well be eliminated;
- Commercial advertising is being protected more than ever before;
- Expenditures on political campaigns are being treated like political speech;

- People’s rights to sue the government are being radically curtailed;
- Property rights are expanding; and
- The administrative state, and its efforts with respect to safety, health, and the environment, are under severe constitutional pressure (in some ways, this may be the most important development of all).

Twenty years from now, our rights and our institutions are bound to be very different from what they are today. They are already very different from what they were ten years ago.

One thing should be clear: There is an uncomfortable overlap between the views of the majority of the Supreme Court of the United States and the views of the right wing of the contemporary Republican Party. For those “originalists” who insist that the Court is simply “adhering to the written Constitution,” that is a red flag. It would be a stunning coincidence if the Constitution as understood in (say) 1792 or 1871 turned out to match the convictions of a political party in 2022.

At the same time, it is crucial to see that the Court has been claiming to follow “the original public meaning” of the founding document and to discipline constitutional law by close reference to it. When the Court recognized an individual right to possess guns, it spoke of the original public meaning of the Second Amendment. In a similar vein, the Court has also been emphasizing the importance of long-standing traditions and suggesting that if those traditions do not recognize a right, it is no right at all. When the Court overruled *Roe v. Wade*, which had protected the right to abortion, it spoke of traditions. With these ideas in mind, the Court seems to be rebuilding constitutional law, almost from the ground up.

Two Goals

In this book I aim to step back from the current debates and explore more enduring questions. I have two main goals. First, I seek to provide a kind of primer, or a guide for the perplexed—an account of what diverse people are saying and doing about the Constitution of the United States, and why they are saying and doing it. My hope is that the account will clarify the nature of legitimate disagreement, whatever one ultimately concludes.

Why do “conservative” judges disagree with “progressive” judges? Why are some judges “originalists,” and why do other judges abhor “originalism”? What are the various options? How shall we evaluate them? If we are not originalists, what might be we? My answers to these questions are meant to provide a conceptual map, one that shows why reasonable people offer different answers (and that also might show why some people are unreasonable). The conceptual map is intended to be highly sympathetic to diverse views, including those that I reject. We take as our guide here John Stuart Mill, who said, “He who knows only his own side of the case knows little of that.”

Second, I seek to ask and answer a single question: *How should we choose a theory of constitutional interpretation?*

My answer is simple: Judges (and others) should choose the theory that would make the American constitutional order better rather than worse. That answer is meant to emphasize that when people disagree about constitutional interpretation, they are actually disagreeing about what would make the American constitutional order better rather than worse.

That claim is much less innocuous than it might seem. It has bite. It rejects a widespread view, which is that a theory of constitutional interpretation might be “read off” the Constitution itself, or come from some abstract idea like “legitimacy” or

from the very idea of interpretation. For example, many “originalists” believe that their preferred approach is not a product of a choice; they insist that the Constitution makes that choice. The problem is that *the Constitution does not contain the instructions for its own interpretation.*

You might want to ask: Who decides what would make the American constitutional order better rather than worse? If you ask that question, you might mean to offer an objection to my argument. Please stand down. The answer is: Anyone trying to choose a theory of interpretation. Judges; legislators; presidents; you; me; us. That’s all there is. There’s no one else.

It follows that any approach to constitutional interpretation needs to be defended in terms of its effects, broadly conceived—of what it does for our rights and our institutions. You might be inclined to think that judges should be “originalists,” or should respect “democracy,” or should not be “activists.” You might think that the rule of law and stability over time are of central importance. You might think that the Supreme Court should adopt a strong presumption in favor of the constitutionality of what Congress and the president do—which means that the Court should uphold most of such actions against constitutional attack. Or you might reject that idea and think that the Supreme Court should take a strong stand in favor of certain rights—say, the right to free speech or the right to religious liberty. If so, the approach to interpretation that you favor must be justified on the ground that it would make our constitutional order better rather than worse (in terms of your own considered judgment about what counts as better and what counts as worse), and it must be compared to alternatives.⁵

5. True, we have to be careful here. For judges, at least, a theory of interpretation cannot be made up out of whole cloth. Suppose that a judge embraces a theory of

Reflective Equilibrium and Fixed Points

To cut to the chase: To defend a theory of interpretation, judges (and others) must seek a kind of “reflective equilibrium.” The term comes from moral and political philosophy, where the search for reflective equilibrium plays a central role. In chapter 4, I will have a fair bit to say about what reflective equilibrium involves. For now, the basic idea is that we try to ensure that our moral and political judgments line up with one another, do not contradict each other, and support one another. We achieve reflective equilibrium when that happens. That idea might seem unfamiliar and mysterious, but the search for reflective equilibrium is actually common; in thinking through hard questions, and maybe even easy ones, you probably seek reflective equilibrium.

interpretation that is wildly out of step with two hundred years of American law, or even fifty such years. If so, she will have a lot of explaining to do, and it is not clear that any imaginable explanation will be sufficient. We need to distinguish between the theory of interpretation that an external observer might favor, were she permitted to adopt one on her own, and the theory of interpretation that a real-world judge might favor, given the fact that the judge is a real-world judge and a participant in a particular tradition. I will be assuming here that the reasonable candidates for a theory that an external observer might favor are already present, to a greater or lesser extent, within the American legal tradition. I do not merely assume that; I believe it to be true.

Of course I might be wrong on that point. There might be something new under the sun, and someone might find it or name it. You never know. But as we will soon see, the American legal tradition contains many candidates for a theory of interpretation. (You can decide which of them is reasonable.) I will be paying considerable attention to the question whether one or more of them would be inconsistent with large segments of American law. If they are, that is a problem. It may or may not be a decisive problem. But for both external observers and real-world judges, there is no escape from the question whether an approach would make the American legal system better rather than worse.

Suppose, for example, that you are trying to figure out what morality requires. How will you do that? If you are seeking reflective equilibrium, you will focus both on individual practices that seem to you to be self-evidently wrong and on theories that might explain why they are wrong. You want to bring order to your judgments; you test them against each other. For instance, you might be strongly inclined to believe that torture is wrong. That belief might be a provisional “fixed point” for you, in the sense that you will be deeply committed to it and exceptionally reluctant to give it up. In fact you might have a host of “fixed points,” understood as judgments to which you are deeply committed. You might think that murder and rape are wrong, that lying is wrong, that assault is wrong, that theft is wrong. It might be that, for you, some of these thoughts are more fixed and firm than others. The most fixed convictions will play the largest role in your thinking. If a proposed theory suggests that slavery is permissible, you would be unlikely to find that theory acceptable.

I will be suggesting that the search for reflective equilibrium does, and must, play a central role in constitutional law. In fact, it is the only game in town. In deciding how to interpret the Constitution, we cannot pull a theory out of the sky, insist that it must be right, and declare victory. It is hopeless to try to justify a theory of interpretation by pointing to some large-sounding word, such as “legitimacy” or “democracy” or even “interpretation” (even though those words are relevant). Instead people must work to align their provisional judgments, described at multiple levels of generality. People might think that no theory of interpretation should allow unelected judges to do whatever they want; that is a provisional fixed point (and a good one). People might think that any theory of constitutional interpretation had better give a lot of protection to

freedom of speech; for them, that is a provisional fixed point (and another good one). They might think that any theory of constitutional interpretation had better forbid torture; that is also a provisional fixed point (good once more). They might think that any theory of constitutional interpretation had better promote the rule of law, understood to include stable rules that are understandable and clear, and that apply to all, not just to some; that is also a provisional fixed point (very good indeed).

Some fixed points are not so provisional; people would be most unwilling to give them up. Oliver Wendell Holmes Jr. referred to his “Can’t Helps,” understood as his firmest convictions, the beliefs that he could not help but hold.⁶ When I was clerking for Justice Thurgood Marshall in 1980, I once urged my boss to vote to strike down a government practice that I saw as horrific and fundamentally unfair. After we quarreled for about an hour, Marshall looked at me skeptically and exclaimed, “Okay, I’ll use Felix’s test. It don’t make me puke!” It was decades later (in 2022) that I learned that Justice Felix Frankfurter did indeed say, in conference with his fellow justices, that a practice was not so offensive as to make him “puke.”⁷

With all due deference to Marshall and Frankfurter, this is not the most lovely way to describe matters. We might say instead that people have some exceptionally strong convictions about what the Constitution must mean, forbid, or require, and that it would take a great deal to dislodge those convictions. It follows that people must explore how their firm judgments about particular cases (racial segregation, compulsory sterilization, sex discrimination, gun control) fare under potential

6. See Oliver Wendell Holmes Jr., *Natural Law*, *Har. L. Rev.* 32 (1918): 40.

7. See Brad Snyder, *Democratic Justice* (2022), 488.

theories of interpretation. If a theory would override those judgments, then that theory should be questioned. We need to go back and forth between possible theories and the outcomes that they produce. Theories might have a great deal of appeal in the abstract, but if they license the Supreme Court to strike down the Social Security Act, they might not be so appealing.

It is important to say that fixed points about constitutional law are not, or are not simply, fixed points about morality and justice. They have to be fixed points about constitutional law—as in the view that the First Amendment protects political dissent or the Eighth Amendment forbids torture. Those are not merely abstract claims about morality and justice. It is also important to reiterate that our fixed points operate at multiple levels of generality. They are not only about specific cases. We might have a commitment to federalism (however we understand it), which is abstract. We might have a commitment to self-government, which is also abstract, and a commitment to freedom of religion, which seems a bit less abstract, and a commitment to the idea that the government can impose taxes on everyone, which seems less abstract still. We might have a commitment to the idea that the Constitution does not allow governments to mandate school prayer, which is pretty particular.

Of course, it is true that our fixed points might turn out, on reflection, not to be so fixed. Some of our fixed points might ultimately be moral fixed points, not constitutional fixed points, and (one more time) the two are not the same. You might think, for example, that in a just society no one will starve, without also thinking that there is a constitutional right not to starve. And whether we are speaking of morality or constitutional law, what is fixed today might not be fixed a month, a year, or a decade from now. Constitutional law itself reflects that point. It

fixes and unfixes things. In 1930 it would have been pretty radical, and maybe even preposterous, to say that the Constitution forbids racially segregated schools. As of this writing, it would be radical, and quite preposterous, to say that the Constitution does not forbid racially segregated schools. In 1980 it would have been pretty radical, and maybe even preposterous, to say that the Constitution requires states to recognize same-sex marriage. Just four decades later, it would have been a bit radical, if not preposterous, to say that the Constitution does not require states to recognize same-sex marriage. In 1990 it would have been pretty radical, if not preposterous, to say that the Constitution creates an individual right to possess guns. As of this writing, that right is entrenched in constitutional understandings. We can be confident that some of our fixed points about constitutional law, right now (your fixed points, my fixed points), will get unfixed in the next ten or twenty years, and we (you and I) will wonder: How could we have thought that, way back when?

All this is true and important. Humility and openness are critical. Still: To know what theory to adopt, judges and others must see if they can be satisfied that a proposed theory fits well, or well enough, with their most deeply held views about particular cases—and also that the theory also fits well, or well enough, with broad values involving the rule of law, self-government, liberty, and equality.

I will have a lot more to say about the search for reflective equilibrium; these should be taken as preliminary remarks. That search, I will suggest, gives more specific answers to the question of what judges (and others) are really disagreeing about. Some judges would be dismayed to learn that their theory would mean that the Clean Air Act is unconstitutional; others would be cheered. Some judges would be dismayed to

learn that a theory of interpretation would lead to a right to same-sex marriage; others would be delighted. Some judges would be dismayed to learn that their theory would grant judges considerable discretion to give content to the idea of “liberty”; others would be pleased. Some judges are appalled by the idea of judicial discretion; others are disturbed by it; still others welcome it. Their dismay, delight, or cheer matter, and should matter, to their views about what theory to adopt.

That is a central reason that judges (and others) disagree about how to interpret the Constitution. There is no God’s-eye view here (or at least we do not have ready access to it).

One of my central claims is that “fixed points”—including convictions about what is good or right in particular cases—must play a central role in choices about the right theory of constitutional interpretation, and that to a remarkable degree they actually do so. If a theory would lead to the conclusion that racial segregation is constitutional, almost everyone in the modern era would question it. It should come as no surprise that exponents of various theories are at pains to explain why their preferred approach does not lead to that conclusion. Indeed, they are typically at pains to show that their preferred approach leads to (many) wonderful results, and that if some bad results do follow from their preferred approach, they are not too many, and they are not too bad—or that if they seem bad, they are not bad at all (perhaps because democracy is what matters or will ride to the rescue).

I aim, then, to defend the proposition that any approach to constitutional interpretation must be justified on the ground that it would make our constitutional order better rather than worse. But I will also use that proposition to question some prominent theories of interpretation—including, and above all, originalism. The issues here are not straightforward, in part

because originalism comes in many shapes and sizes, and it is not entirely clear what it entails. But the basic idea is that originalism would not have good consequences; it would lead to a system of constitutional law that is far inferior to the one we actually have. Of course, that conclusion has to be earned, not just asserted.

For the Record

What, then, is the best approach to constitutional interpretation? What approach does this book defend? What is the solution? (What rabbit might be pulled out of a hat?)

You might be disappointed to hear that my main goal is not to answer these questions. I am seeking to understand what those who disagree about theories of interpretation are actually disagreeing about, and offering an account of how to choose among competing theories. But just for the record, I agree with what Felix Frankfurter wrote in a private memorandum in 1953:⁸

But the equality of the laws . . . is not a fixed formula defined with finality at a particular time. It does not reflect, as a congealed summary, the social arrangements and beliefs of a particular epoch. It is addressed to the changes wrought by time and not merely the changes that are the consequences of physical development. Law must respond to transformations of views as well as that of outward circumstances. The effects of changes in men's feelings for what is right and just is equally relevant in determining whether a discrimination denies the equal protection of the laws.

8. See Richard Kluger, *Simple Justice* (1977), 685.

True, the Constitution itself does not change over time (unless amended), but the meanings of its terms do change over time, not only because of changes in facts but also because of changes in values. Our system of constitutional law is a common-law process, in which assessments of particular cases, and social and judicial judgments over time, produce large-scale changes (even when the claim is one of restoration—a claim, by the way, that is often false). In the chapters that follow, I will attempt to explain these propositions, both by reference to interpretation in general and by reference to some concrete problems. How, for example, has the U.S. Constitution come to be understood to offer very broad protection of free speech? Or to forbid sex discrimination? The answers do not lie in recovery of some ancient wisdom.

At the same time, I believe that constitutional interpretation should be undertaken with close reference to the underlying goal of creating a *deliberative democracy*—a system that places a premium on reason-giving in the public domain (and hence on a *deliberative* democracy) and also on accountability to We the People (and hence on a *deliberative democracy*). A deliberative democracy prizes majority rule, but it is not simply majority rule. Majorities cannot simply do as they like simply because that is what they like to do. They must establish public-regarding justifications for their decisions. Reasons are essential. But a deliberative democracy is one of self-government, not bookishness or abstract theorizing. Self-government has certain preconditions, including protection of the franchise and a well-functioning system of freedom of expression.

With these points in mind, I am in emphatic agreement with John Hart Ely and Stephen Breyer insofar as they emphasize the need for a strong judicial role in protecting the preconditions

for democratic self-government.⁹ (This is not, by the way, a form of originalism.) The idea of deliberative democracy entails a significant role for federal courts in safeguarding political speech, the vote, and the democratic process as a whole. The role has always been important; it is crucial today. It also entails firm protection of those who are at a systematic disadvantage in the political process. That role, too, has always been important; it also is crucial today.

I believe all of these things, but (one more time, for emphasis) my main goal here is not to defend those beliefs. It is to defend some claims about the grounds on which you might or might not agree with them. My largest hope is that many readers might see, on reflection, that those claims are not wrong; and that they will recognize anew the (real) foundations of their own views about constitutional interpretation (and perhaps be willing to rethink them). If so, we will have a lot more clarity, not least because we will know what people are actually disagreeing about. With more clarity, we should have less yelling. And with more clarity, we might even be able to have more agreement on what is best about our constitutional order, which includes the creation of an ever-more-perfect union, with more in the way of democracy and more in the way of deliberation.

The Plan

This book consists of six chapters. Very briefly: Chapter 1 outlines the possible approaches; it is essentially a reader's guide. Chapters 2 and 3 explain why there are no quick wins here; no view can claim a victory from some noun (like "interpretation")

9. See Cass R. Sunstein, *The Partial Constitution* (1993).

or adjective (like “lawless”). Chapter 4 explains how we choose a theory of interpretation—and what reasonable people are disagreeing about. Chapter 5 focuses on traditionalism and its appeal, and why, in the end, it should be rejected.

In a bit more detail: Chapter 1 introduces the leading approaches to constitutional interpretation. Chapter 2 explains that there is nothing that interpretation just is—that we have a variety of conceptions of interpretation, and it is up to us which one to choose. Abstractions and generalities will not make that choice for us. Chapter 3 briefly investigates, and rejects, the claim that the oath of office entails a particular approach to interpretation. Because all judges take the oath, and because many people think that it has implications for the choice of theories of interpretation, I shall spend some time on it here. As we shall see, everything about the oath of office is interesting.

Chapter 4, the beating heart of the book, argues that fixed points, operating at various levels of abstraction, are crucial to the choice of a theory of interpretation. Chapter 5 turns to traditionalism, with particular reference to the Supreme Court’s decision in the *Dobbs* case, which overruled *Roe v. Wade*. The central argument (or is it an article of faith?) is that the arc of history bends toward justice, which means that constitutional law should hesitate before turning long-standing practices into either a sword or a shield, and which means (above all) that improved moral understandings deserve to play a role in constitutional law. Chapter 6 is a *cri de coeur*, in the form of a brisk account of what, in my view, the U.S. Constitution should allow and forbid.

INDEX

- abortion, 7, 40–41, 42, 52, 139, 141–43
active liberty, 41, 80
affirmative action, 40, 53, 123–24, 126, 161
Alexander, Larry, 27, 67–68
Alito, Samuel, 30
anticaste principle, 163–64
assisted suicide, 138
authorial intentions. *See* original intentions

Balkin, Jack, 76–77
Barnett, Randy, 72–74, 75, 122n40, 125nn44 and 45
Barrett, Amy Coney, 30
bat-and-ball problem, 128
Baude, William, 34–35, 77–79
Bentham, Jeremy, 150
Bernick, Evan, 72–73, 122n40, 125nn44 and 45
Bickel, Alexander: *The Least Dangerous Branch*, 44
Bolling v. Sharpe (1954), 111–13, 116, 121, 126
Bork, Robert, 28
Bowie, Nikolas, 54–55
Brandeis, Louis, 100
Breyer, Stephen, 17–18, 41, 52, 80
Brown v. Board of Education (1954), 33, 40, 71, 83, 116, 117, 121–23, 126
Buckley, William F., Jr., 133
Burke, Edmund, 41–42, 133, 150

Cardozo, Benjamin, 100
Carolene Products case (1938), 38–39
choice of theory, and results, 101–31;
 challenge of fixed points, 122–31;
 interpretation and fixed points, 110–19; and reflective equilibrium, 102, 105–8, 109n, 116; theories and cases, 119–22
choice of theory, justification for, 61–91;
 and constitutional order, 62, 68, 69, 88–91; fit and justification, 80–84;
 interpretation and construction, 84–88; and law of interpretation, 77–80; original intentions, 63–66; original meaning, 66–67; and systemic impact, 67–77
common-good constitutionalism, 58–59
common-law constitutionalism, 56–58, 145
common-law process, 17
constitutional interpretation, paradigm shift in, 1–19; choosing theory of interpretation, 16–18; and constitutional order, 8–9, 9n, 60; examples of, 6–7; judicial interpretation, 8; reflective equilibrium and fixed points, 10–16
constitutional order, 8–9, 9n, 60, 62, 68, 69, 88–91
Constitution in Exile concept, 6

- Daniels, Norman, 107
- deliberative democracy, 17, 18, 162–65
- democracy-reinforcing judicial review, 21, 37–41, 42, 52, 55, 60, 131, 164n
- deontological judgments, 108–9, 109n
- District of Columbia v. Heller* (2008), 66, 119, 161
- Dobbs v. Jackson Women's Health Organization* (2022), 132, 133–34, 161. *See also* traditionalism, and *Dobbs* Court
- Due Process Clause. *See* Fifth Amendment; Fourteenth Amendment; traditionalism, and *Dobbs* Court
- Dworkin, Ronald, 44, 45–47, 59, 80–82, 83–84, 145–46
- Eighteenth Amendment, 190–91
- Eighth Amendment, 13, 187
- Eleventh Amendment, 187
- Ely, John Hart, 17–18, 37, 52, 80, 135, 164n; *Democracy and Distrust*, 38–41
- Fallon, Richard, 31
- Fifteenth Amendment, 164, 189–90
- Fifth Amendment, 53, 186; Due Process Clause, 23, 30, 111–13, 121. *See also* traditionalism, and *Dobbs* Court
- First Amendment, 13, 20, 22, 23, 35, 36, 45, 53, 85, 121–22, 154, 155, 185
- fit and justification, 80–84, 145–46
- fixed points, 10–16, 110–19, 122–31, 161
- footbridge problem, 109n
- forum of principle, 146, 149–51
- Fourteenth Amendment, 20–21, 33, 36, 38, 53, 123–24, 126, 139, 164, 188–89; Citizenship Clause, 113n; Due Process Clause, 146–47; Equal Protection Clause, 111–13, 113n, 117, 121, 154–55; Privileges and Immunities Clause, 147–48
- Fourth Amendment, 186
- Frankfurter, Felix, 12, 16, 51, 100, 133
- freedom of speech, 4, 29, 80, 154
- Friendly, Henry, 100
- Giennapp, Jonathan, 24, 31–32, 94n4
- Ginsburg, Ruth Bader, 52, 100
- Glucksberg* case (1997), 138
- Gorsuch, Neil, 30, 66
- Green, Christopher, 93, 98
- Harlan, John Marshall II, 100, 163
- Holmes, Oliver Wendell, Jr., 12, 48, 51, 67, 99–100, 132–33
- Hughes, Charles Evans, 100
- interpretation and construction, 84–88
- Jackson, James, 3–4, 165
- Jackson, Ketanji Brown, 123–24, 126
- Jackson, Robert, 100
- judicial activism, 54
- judicial review, 49–50, 54, 55
- justification, in legal interpretation, 81–84
- Kagan, Elena, 22
- Kantianism, 108
- Kavanaugh, Brett, 30
- law as integrity, 44
- Lawrence v. Texas* (2003), 83, 120, 138, 147
- Lessig, Lawrence, 29, 45
- Levanthal, Harold, 100
- Lochner* Court, 81
- Lochner v. New York* (1905), 132–33, 139
- Madison, James, 31–32
- majority rule, 17
- Marshall, John, 70
- Marshall, Thurgood, 12, 100

- Massachusetts Historical Commission, 2
Michael H. v. Gerald D. (1989), 137, 138
Michaels, Walter Benn, 27–28
Mill, John Stuart, 8
moral progress, 149–51, 160
moral readings, 21, 43–47, 52, 53, 55–56,
59, 81, 83, 90, 109n, 159

Nineteenth Amendment, 191
Ninth Amendment, 24, 148n30, 187

oath of office, 49, 92–100, 157
Obergefell v. Hodges (2015), 117, 120,
134, 138, 147
optimistic bias, 108–9
original expectations, 36
original intentions, 26–29, 63–66
originalism: and challenge of fixed points,
121–27; comparison to traditionalism,
132; consequences of, 15–16; and
constitutional order, 60; and Due
Process Clause, 147; fallacies of, 8–9;
limitations of, 46–47, 59, 159, 164;
as modern political movement, 28;
and U.S. Supreme Court, 7. *See also*
choice of theory, justification for
originalism as “our law,” 34–35
original methods, 35
original public meaning, 7, 21, 26, 29–34,
36, 52, 53, 66–69, 82–87, 93, 97–99, 119

Pascal, Blaise, 150
Plessy v. Ferguson (1896), 163
political speech, 40
popular constitutionalism, 54
Posner, Richard, 100
Powell, Lewis, 100
precedents, 58, 82–83, 90, 115, 120, 124, 126
present bias, 109
privacy rights, 40–41

Privileges and Immunities Clause. *See*
Fourteenth Amendment
progressive constitutional law, 37–38, 124
progressive originalism, 123–24

racial segregation, 14, 33, 40, 53, 110–12
rational basis test, 50n44, 142–45
Rawls, John, 102; *A Theory of Justice*, 103–7
reflective equilibrium, 10–16, 102, 105–8,
109n, 116, 157
reflective equilibrium, and choice of
theory, 157–65; and anticaste principle,
163–64; and deliberative democracy,
162–65; and fixed points, 161; limita-
tions of theories, 159–61, 164; prop-
ositions to consider, 160–63
Renan, Daphna, 54–55
Republican Party, right wing views of, 7
Roe v. Wade (1973), 7, 40–41, 147, 151, 161.
*See also Dobbs v. Jackson Women’s
Health Organization* (2022)
Roosevelt, Franklin Delano, 115, 130, 165
rule of law, 14, 68–69, 72, 74, 125, 129n

Sachs, Stephen E., 34–35, 77–79
same-sex marriage, 14, 47, 104, 117, 134
Scalia, Antonin, 30, 52, 66, 69–71, 82–83,
126, 137–38
Second Amendment, 7, 23, 52, 186
Second Bill of Rights (FDR), 115, 130
semantic originalism, 24–26, 32, 68,
76–77, 95–97
Seventeenth Amendment, 190
Seventh Amendment, 186
Shallus, Jacob, 173
shared public context, 30
Siegel, Reva, 47–48
Sixteenth Amendment, 190
Sixth Amendment, 186
social movements, 47

- Solum, Lawrence B., 31, 31n8, 68–69, 85–87
- Stevens, John Paul, 138
- Strauss, David A., 56–57
- substantive due process, 53, 135, 143
- summing problem, 29–30
- Tenth Amendment, 187
- textualism, 22–24, 52, 54, 144
- Thayer, James Bradley, 48, 164
- Thayerism, 48–56, 59–60, 88–90, 119–20, 130, 145, 159, 164, 164n
- theories of interpretation, nonoriginalist: common-good constitutionalism, 58–59; common-law constitutionalism, 17, 56–58, 145; democracy-reinforcing judicial review, 21, 37–41, 42, 52, 55, 60, 131; moral readings, 21, 43–47, 52, 53, 55–56, 59, 81, 83, 90, 159; Thayerism, 48–56, 59–60, 88–90, 119–20, 130, 145, 159, 164, 164n; traditionalism, 41–43, 52, 59, 120–21, 130, 159–60
- theories of interpretation, originalist, 20–60; original expectations, 36; original intentions, 26–29, 63–66; originalism as “our law,” 34–35; original methods, 35; original public meaning, 7, 21, 26, 29–34, 36, 52, 53, 66–69, 82–87, 93, 97–99, 119; semantic originalism, 24–26, 32, 68, 76–77, 95–97; textualism, 22–24, 52, 54, 144
- Third Amendment, 186
- Thirteenth Amendment, 164, 188
- Thomas, Clarence, 30, 52, 66, 82, 126
- traditionalism, 41–43, 52, 59, 120–21, 130, 159–60
- traditionalism, and *Dobbs* Court, 132–56; consequences of, 139–44; and Due Process Clause, 135–39; impacts on constitutional law, 146–48; and judicial discretion, 144–46; limitations of, 151–56; principle and moral progress, 149–51
- traditions, long-standing, 7
- translation of constitutional provisions, 45–46
- trolley problem, 109n
- Twelfth Amendment, 187–88
- Twentieth Amendment, 191–92
- Twenty-Fifth Amendment, 194–95
- Twenty-First Amendment, 192
- Twenty-Fourth Amendment, 194
- Twenty-Second Amendment, 193
- Twenty-Sixth Amendment, 195
- Twenty-Third Amendment, 193
- U.S. Constitution: Article I, 175–80; Article II, 180–82; Article III, 183; Article IV, 184; Article V, 185; Article VI, 185; Article VII, 185; excerpts from, 4, 24–25, 92. *See also specific amendments*
- U.S. Supreme Court: aggressive role in moral reading, 127; cases not matching with original public meaning, 78–79; as forum of principle, 146; right wing majority views of, 7, 118; on same-sex marriage, 47. *See also specific justices and cases*
- utilitarianism, 108
- Vermeule, Adrian, 58–59
- Waldron, Jeremy, 89n
- Warren, Earl, 37, 38
- Warren Court, 28, 37–38, 54, 81
- Williams, Stephen, 100
- Wood, Ephraim, 2–3