MICHAEL J. PERRY

The Constitution, the Courts, and Human Rights

THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS

An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary

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For my Father

Come, you whom my Father has blessed, take for your heritage the kingdom prepared for you since the foundation of the world. For I was hungry and you gave me food; I was thirsty and you gave me drink; I was a stranger and you made me welcome; naked and you clothed me, sick and you visited me, in prison and you came to see me.

Lord, when did we see you hungry and feed you; or thirsty and give you drink? When did we see you a stranger and make you welcome; naked and clothe you; sick or in prison and go to see you?

I tell you solemnly, in so far as you did this to one of the least of these brothers of mine, you did it to me.

Matthew 25:34–40

You said to me: "The greatness of my country is beyond price. Anything is good that contributes to its greatness. And in a world where everything has lost its meaning, those who, like us young Germans, are lucky enough to find a meaning in the destiny of our nation must sacrifice everything else." I loved you then, but at that point we diverged. "No," I told you, "I cannot believe that everything must be subordinated to a single end. There are means that cannot be excused. And I should like to be able to love my country and still love justice. I don't want just any greatness for it, particularly a greatness born of blood and falsehood. I want to keep it alive, by keeping justice alive."

Albert Camus, *Letters to a German Friend*

PREFACE

In this book, which is an essay in constitutional theory, I address a wide range of issues. There are two basic issues that I do not address, however, and I think it will clarify my argument if I indicate, here at the outset, what those two issues are.

First. I am concerned with the legitimacy of constitutional policymaking (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution (extraconstitutional policymaking). I am not concerned with the distinct issue of the legitimacy of constitutional policymaking that goes *against* the framers' value judgments (contraconstitutional policymaking). The former is an issue in democratic theory. Moreover, it is an issue that might engage any society, even one without a written constitution and therefore without framers, if that society (1) is committed, at the level of its political-legal culture, to democratic government but (2) has a politically unaccountable judiciary that opposes itself, in the name of some "fundamental" but unwritten law, to the politically accountable branches and agencies of government.

The latter is a different sort of issue. There the problem is not the legitimacy, in terms of democratic theory, of an activist but politically unaccountable judiciary, but the legitimacy of any governmental institution, including the judiciary, acting contrary to (some aspect of) the written fundamental law, understood as norms constitutionalized by framers. Only a society with a written constitution could be engaged by the latter issue.

I am concerned here exclusively with the former issue—indeed, contemporary constitutional theory is concerned almost exclusively with that issue—because virtually no constitutional doctrine (regarding freedom of expression, equal protection, etc.) established by the modern Supreme Court represents a value judgment contrary to any of the framers' value judgments. Nonetheless, because it is possible that enforcement, by the federal judiciary against the governments of the fifty states, of value judgments *beyond* those constitutionalized by the framers is itself a contraconstitutional practice—a practice *contrary to* the *federal* character of American government established by the framers—the legitimacy of contraconstitutional (judicial) practice is a basic issue that ought to be addressed and that I shall address in a later essay.*

*For an important recent essay that attends to the distinction between (what I am calling) extraconstitutional and contraconstitutional policymaking, see Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

Second. In my view, which I elaborate in chapter 4, a necessary but not sufficient condition of a successful defense of constitutional policymaking by the judiciary in human rights cases is that there be right answers to political-moral questions. That is a necessary condition, because if there are not right answers, one cannot justify constitutional policymaking in human rights cases;* but it is not a sufficient condition, because even if there are right answers, it might still be impossible to justify constitutional policymaking.†

My defense of constitutional policymaking in human rights cases presupposes that there are right answers, and I have some things to say about the matter of right answers, and of moral skepticism, in chapter 4. But I do not pretend to defend the claim that there are right answers. This is not an essay in metaethics. However, the problem of objectivity in ethics is a fundamental issue that constitutional theory cannot ignore if it hopes to make a genuine intellectual advance. I shall address that problem too in a later essay.‡

* * * * * *

Thus, there is more, and fundamental, work to be done. This essay is simply my beginning. I hazard to publish it now, not because I have addressed all the relevant issues, nor because I have made up my mind, once and for all, on the issues I have addressed. Most assuredly I have done neither. I hope to be thinking and writing about the various relevant issues for another thirty or forty years. (I may even be forced, from time to time, to change my mind!) I publish this essay now because I want to help advance the conversation of constitutional theory.

*See Nagel, *The Supreme Court and Political Philosophy*, 56 N.Y.U. L. Rev. 519, 519 (1981): "[E]ven some skeptics about ethical truth may nevertheless be willing to allow the Court to make decisions or to create results . . . when those results do not exist in advance, waiting to be discovered." My claim, however, developed in chapter 4, is that no defense of judicial activism can succeed that does not presuppose that there are right answers. (I doubt that to say that there are right answers in ethics is to say that those answers "exist in advance, waiting to be discovered.")

†*Cf. id.* at 519: "[E]ven a believer in the existence of objectively discoverable ethical truth will not want to assign to the Court general jurisdiction over the determination and enforcement of that truth."

‡Lawrence Sager, commenting on an earlier version of chapter 4 (Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U.L. Rev. 278 (1971)), has written that "Professor Perry . . . [is] very much a rights skeptic." Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U.L. Rev. 417, 420 n. 6 (1981). If by rights skeptic Professor Sager means (as he seems to) one who doubts that very much modern constitutional doctrine regarding human rights can be grounded in the *written* Constitution (*see id.* at 419), then I am certainly a rights skeptic. But this book, in particular chapter 4, should make it clear that I reject moral skepticism. (For a frontal assault on contemporary moral skepticism, see

A final prefatory word: Some constitutional theorists have recently suggested that the conversation in which I and others are engaged is a dead-end. Paul Brest, for example, has claimed that "the controversy over the legitimacy of judicial review in a democratic polity—the historic obsession of normative constitutional law scholarship—is essentially incoherent and unresolvable."* I flatly reject any such claim. I hope this book demonstrates that the controversy is both coherent and resolvable (although, to be sure, the eventual resolution may be other than I imagine it to be).

I want to express my deep gratitude to several individuals. For moral support, and for translating that support into a most congenial work environment: Dean James E. Meeks. For generous financial support: The Ohio State University and its College of Law. For critical evaluations of earlier versions of the essay, but for which I would surely be in even bigger trouble than I am: Larry Alexander, Dan Conkle, Kent Greenawalt, Lou Jacobs, Bill Nelson, Jerry Reichman, Rich Saphire, Greg Stype, Jack Weinstein, Steve Wineman, Larry Zacharias, and the students in my 1980 autumn-quarter seminar in constitutional theory. For help in getting the manuscript ready for publication: Gayle Swinger, Jeff Page, and Pat Schirtzinger. I owe a special word of thanks to a dear friend, Susan Kuzma, whose unstinting aid on a number of fronts was simply invaluable.

R. UNGER, KNOWLEDGE AND POLITICS (1975), in particular chaps. 1 and 5; H. Putnam, REASON, TRUTH AND HISTORY (1981). *See also* J. Finnis, NATURAL LAW AND NATURAL RIGHTS (1980).

*Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1063 (1981). *See also* Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L. J. 1037 (1980).

CONTENTS

PROLOGUE

Over a quarter century ago, in *Brown v. Board of Education*,[1] the Supreme Court of the United States ruled that racially segregated public schooling violates the United States Constitution.[2] More recently, in *Roe v. Wade*,[3] the Court ruled that restrictive abortion legislation violates the Constitution.[4] In neither case was the Court's ruling authorized, much less required, by the Constitution as written and understood by the framers of that document;* neither ruling, as we will later see, was really the outcome of "interpretation" or "application" of any value judgment made by the framers and embodied by them in the Constitution. In each case the Court's ruling represented the Court's own value judgment:[5] the Court struck down a policy choice made by an electorally accountable branch of government—in *Roe*, for example, a state legislature—and supplanted it with a policy choice of its own.

Constitutional theorists continue to regard *Roe v. Wade* as one of the most controversial constitutional cases in recent times precisely because the Court's ruling cannot be explained by reference to any value judgment constitutionalized by the framers.[6] Many critics of the Court think that *Roe* represents the Court at its worst.[7] *Brown v. Board of Education*, by contrast, is generally thought to represent the Court at its best.[8] And yet, if the

*By the "framers," I mean, primarily, those persons—sitting in the original Constitutional Convention or, in the case of amendments to the Constitution, in Congress—who voted to propose the relevant constitutional provision and, secondarily, those persons in the individual state conventions or legislatures who voted to ratify the provision. The framers' understanding of a particular provision is what I mean by the "original understanding" of the provision. Ascertaining the *precise* contours of the original understanding of any given provision may be difficult, sometimes even impossible. *See* P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 139–45 (1st ed. 1975); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 209–17 (1980); Tenbroek, *Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 27 CALIF. L. REV. 399, 405–06 (1939).

Still, it is usually possible to ascertain the rough contours of that understanding. And once the rough contours have been ascertained, it is frequently possible to say: Although we do not know exactly what the framers thought this provision *would* accomplish, there is strong evidence they thought it would *not* accomplish *X*; or strong evidence they did not think it would accomplish *X*; or no evidence, or wholly inadequate evidence, they thought it would accomplish *X*. The historian's ability to ascertain the rough contours of the original understanding of the various constitutional provisions discussed or mentioned in this book is sufficient for purposes of the claims about the original understanding on which I rely. *Cf.* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 16 (1980): "I [am not] endorsing for an instant the nihilist view that it is impossible ever responsibly to infer from a past act and its surrounding circumstances the intentions of those who performed it." (I address the matter of the framers' intentions at greater length in chap. 3.)

Court's ruling in *Roe* were illegitimate—as many of the Court's critics insist it is—on the ground that it is not explicable by reference to any of the framers' value judgments, the Court's ruling in *Brown* would have to be deemed illegitimate too, since *neither* ruling was the outcome of interpretation or application of any value judgment constitutionalized by the framers.*

The rulings in *Brown* and *Roe* are not unique in that regard. To the contrary, they are typical of the Supreme Court's modern constitutional workproduct. Virtually all of modern constitutional decision making by the Court—at least, that part of it pertaining to questions of "human rights,"† which is the most important[9] and controversial part, and the part with which I am mainly concerned in this book—must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented. In the modern period of American constitutional law—which began in 1954, with *Brown v. Board of Education*[10]—the United States Supreme Court has played a major and unprecedented role in the formulation of human rights.[11] Most first amendment doctrine regarding political and religious liberty; most equal protection doctrine regarding racial, sexual, and other forms of discrimination; all due process doctrine regarding rights pertaining to contraception, abortion, and sexual behavior; and various constitutional doctrines regarding the rights of inmates of prisons and mental health facilities—this list is far from exhaustive—reflect not value judgments, or interpretations or applications of value judgments, made and embodied in the Constitution by the framers, but value judgments made and enforced by the Court against other, electorally accountable branches of government. Thus, in America the status of constitutional human rights is almost wholly a function, not of constitutional interpretation, but of constitutional policymaking by the Supreme Court.

Growing recognition of that fact has occasioned a major debate in contemporary constitutional theory.[12] Many theorists contend that constitutional policymaking by the Supreme Court is illegitimate, in whole or significant part, on the ground that it is fundamentally inconsistent with

*Later, in chap. 3, I amplify and defend my claim that neither ruling is explicable by reference to any of the framers' value judgments. I also argue, in chap. 4, that the constitutional theory that succeeds in justifying the judicial activism underlying the Court's decision in *Brown* also serves to justify the activism underlying its decision in *Roe*. (It does not follow, and would be absurd to maintain, that one who approves the Court's ruling in *Brown* must also approve its ruling in *Roe*.)

†By "human rights," I mean simply the rights individuals have, or ought to have, against government under the "fundamental"—constitutional—law.

our societal commitment to democracy. The Court, it is said, is not a democratic institution, and so may not legitimately engage in constitutional *policymaking*, as opposed to constitutional *interpretation*. This book is an extended inquiry into the legitimacy of constitutional policymaking by the Supreme Court, especially in the area of human rights. It bears mention, here at the outset, that the problem of the legitimacy of constitutional policymaking by the Court is important not merely as an issue in contemporary political-constitutional theory. So it is not at all surprising that judicial policymaking in constitutional cases provokes deep and widespread controversy not only among lawyers and lawyer-academics, but among the lay public as well.[13]

Democracy is a freighted term. Some constitutional theorists have tried to resolve the tension between constitutional policymaking by the Supreme Court and our societal commitment to democratic government more at the level of definition than of theory. They define democracy in terms of certain substantive ideals and then contend that, because (or to the extent that) the Court's constitutional policymaking serves to effectuate those ideals, it is democratic. But that strategem cannot work unless the audience to which it is addressed accepts, or can be persuaded to accept, the controversial claim that the concept of democracy entails the particular substantive ideals stipulated by the theorists, and the further claim, also controversial, that the particular exercise of constitutional policymaking in question serves to effectuate one or more of those ideals. Moreover, the definitional argument simply overlooks the fact that, whatever the character of particular decisions rendered by the Court in the course of constitutional policymaking, the Court itself is plainly not an electorally accountable institution;[14] that fact, as I explain at the beginning of chapter 1, is precisely what gives rise to the debate about the legitimacy of the Court's constitutional policymaking in the first place. Consequently, the definitional argument is destined to exert, and in fact has exerted, very little influence in current constitutional debate.[15]

The notion of democracy on which I rely is primarily procedural, not substantive. With Brian Barry, "I follow . . . those who insist that 'democracy' is to be understood in procedural terms. That is to say, I reject the notion that one should build into 'democracy' any constraints on the content of the outcomes produced, such as substantive equality, respect for human rights, concern for the general welfare, personal liberty or the rule of law."* The following rough definition captures the procedural notion of democracy I have in mind:

*Barry, *Is Democracy Special?*, in PHILOSOPHY, POLITICS AND SOCIETY (FIFTH SERIES) 155, 156 (P. Laslett & J. Fishkin eds. 1979.) *See also* W. NELSON, ON JUSTIFYING DEMOCRACY 3 (1980):

I regard democracy as a system for making governmental decisions. "Democracy" is to be

> A democracy is rule by the people where "the people" includes all adult citizens not excluded by some generally agreed upon and reasonable disqualifying factor, such as confinement to prison or to an asylum for the mentally ill, or some procedural requirement, such as residency within a particular electoral district for a reasonable length of time before the election in question. "Rule" means that public policies are determined either directly by vote of the electorate or indirectly by officials freely elected at reasonably frequent intervals and by a process in which each voter who chooses to vote counts equally . . . and in which a plurality is determinative.[16]

Because the word *democracy* is so freighted and misused, suggestive of vague substantive ideals as well as procedural forms, in the remainder of this book I use it only sparingly. In its stead I use a different term, set forth and amplified in chapter 1: *electorally accountable policymaking.*

Throughout this book, as in this prologue, I frequently write as if the chief question were the legitimacy of constitutional policymaking by the Supreme Court of the United States. The question actually addressed, however, is broader: the legitimacy of constitutional policymaking by the American judiciary generally, which includes the lower federal courts and the courts of the individual states.[17] Still, the controversy surrounding the problem of the legitimacy of judicial policymaking in constitutional cases naturally tends to focus on the Supreme Court, which, among all courts, has the last word on federal constitutional matters.[18] Moreover, by virtue of its preeminent position in the American judiciary—a position of formal leadership with respect to certain matters, but also of informal leadership with respect to many more—the Supreme Court sets a highly visible standard of judicial behavior that many other courts tend to emulate.[19]

I should emphasize, by way of caveat, that this book deals much more with the legitimacy of a policymaking process than with the soundness of

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defined in terms of procedures, not in terms of substantive policy. . . . While there are many legitimate questions to be answered in political philosophy, *one* good question, certainly, is how the various institutions affecting governmental decisionmaking should be structured.

But see H. THOMAS, A HISTORY OF THE WORLD 388 (1979): "Winston Churchill is believed to have said, 'Democracy means that if the door bell rings in the early hours, it is likely to be the milkman.' "

Barry adds: "The only exceptions . . . are those required by democracy itself as a procedure." Barry, *supra* this note, at 156. (For examples of such exceptions, see text accompanying note 16 *infra.*) Barry, therefore, probably would not deny, and in any event I readily concede, that the concept of democracy entails the principle of freedom of expression; after all, for government to manipulate the flow of information is for it to manipulate, to some extent, the choices people make in casting their ballots. But that concession has very limited consequences, as we will see in chap. 3, where I discuss the matter at some length.

any particular substantive constitutional doctrines* generated by that process. The relationship between those two issues deserves clarification. In an important respect the issue of the legitimacy of constitutional policymaking is linked to the issue of the soundness of substantive doctrine. That linkage is explored in chapter 4, where I indicate that the legitimacy of constitutional policymaking by the Supreme Court is *in part* a function of the soundness of substantive doctrine generated by such policymaking. However, the issue of the soundness of substantive doctrine is distinct from the issue of the legitimacy of constitutional policymaking. Although one can fault substantive doctrine on the ground that the policymaking process that generated the doctrine is illegitimate,† to do so is not to take issue with any particular doctrine on the merits, but to dispute the legitimacy of the policymaking process. Whether or not one disputes the legitimacy of constitutional policymaking by the Supreme Court, one can nonetheless inquire into the soundness of a particular substantive doctrine on the merits by asking whether the particular doctrine—say, the rule that government may not interfere with a woman's decision to have an abortion—is sound as *political-moral doctrine*. Again, however, in this book I am only peripherally concerned with the soundness of particular substantive doctrines.

The particular categories of substantive constitutional doctrine to which I mainly refer in this book (when I refer to any) are those concerning: (1) freedom of expression; (2) the equal protection of the laws; and (3) a family of matters subsumed under the rubric "substantive due process." The first two categories are, by consensus, among the most important in the whole corpus of constitutional law. The third category is, again by consensus, the most controversial. But the relevance of what I have to say about the issue of the legitimacy of constitutional policymaking by the Supreme Court is by no means confined to those particular categories of doctrine. I might have referred instead to categories of doctrine concerning, for example, freedom of religion,[20] or the fair administration of criminal justice (although those references, I suspect, would be somewhat less dramatic). Note that *any* substantive doctrine generated by judicial policymaking in constitutional cases is fatally tainted if, as many theorists claim, all such policymaking is illegitimate.[21]

*By substantive constitutional doctrine, I refer mainly to the principles and rules fashioned by the Supreme Court and other courts to resolve constitutional disputes on the merits.

†The notion, of course, is that if the process is illegitimate, any outcome generated by that process is fatally tainted. Even if one is sympathetic to a particular policy choice on the merits, one may oppose that policy choice if it has been made—"imposed"—by an institution believed to lack legitimate authority to make the choice.

Georges Sorel is reported to have said that he "always wrote by reading, that is, by reacting to the ideas of others."[22] This book is, in that sense, an exercise in writing by reading. No one who hopes to do productive work in constitutional theory can fail to take account of the important work already carried out in this century. Especially relevant are works on the modern period of American constitutional law, during which the Supreme Court has served as a principal architect of important human rights, many quite controversial. As I hope this book makes clear, I am particularly indebted to Robert Bork, the most effective critic of constitutional policymaking by the Supreme Court,[23] and John Ely, a much more conservative defender of such policymaking than I[24]—even though I vigorously dissent from the constitutional theories of both men.

An overview of chapters that follow might be helpful. In chapter 1, by way of clearing the ground and constructing a framework for the remainder of my essay, I discuss several preliminary but nonetheless fundamental matters. One such matter is the crucial distinction between "interpretive" judicial review*—constitutional interpretation—the legitimacy of which is not a particularly difficult problem, and "noninterpretive" review—constitutional policymaking—the legitimacy of which is the central problem of contemporary constitutional theory.

Chapter 2 focuses on noninterpretive review, but not, like the rest of the book, noninterpretive review with respect to human rights issues. Rather, the focus of chapter 2 is on noninterpretive review with respect to the other two principal sorts of constitutional issues: "federalism" issues—issues concerning the proper division of power between the federal government and the governments of the states—and "separation of powers" issues—issues concerning the proper allocation of power among the branches of the federal government. In chapter 2, I establish that no consideration presented by either federalism or separation-of-powers issues undermines the claim, put forth by certain constitutional theorists, that all noninterpretive judicial review is illegitimate.

In chapter 3 (and throughout the remainder of the book), the focus is on noninterpretive review with respect to issues of human rights—issues concerning the proper relationship between the individual and the collectivity *qua* government. There I detail the implications of the claim that all noninterpretive review is illegitimate for two major areas of modern constitutional doctrine: freedom of expression and equal protection. And I argue that one recent, quite prominent attempt, by John Ely, to defend noninterpretive review with respect to both freedom of expression and equal protection issues is wholly unsuccessful.

*"Judicial review" refers to the judicial practice of reviewing governmental action (or inaction) to see if it is, as it is claimed to be by the party challenging the action, unconstitutional.

In chapter 4, which is the heart of this book, I attempt to show that even though no justification for noninterpretive review can be predicated on the Constitution as written or even as understood by the framers, there is nonetheless a persuasive functional justification for noninterpretive review with respect to human rights issues—that is, a justification predicated on the crucial function such review serves in American government and also on the particular manner in which it serves that function—and that therefore the claim that all noninterpretive review is illegitimate should be rejected. Along the way, I argue that the only constitutional theory that serves to justify, if any serves to justify, noninterpretive review with respect to either freedom of expression or equal protection issues is one that also serves to justify noninterpretive review with respect to substantive due process issues. (Professor Ely has articulated a theory that purports to justify noninterpretive review with respect to both freedom of expression and equal protection issues but that condemns it with respect to substantive due process issues[25]—a theory I criticize partly in chapter 3 and partly in chapter 4). Essential to my attempt to articulate a functional justification for noninterpretive review with respect to human rights issues is my effort to reconcile such review with our societal commitment to democratic—that is, electorally accountable—policymaking.

One of the most important recent developments in constitutional law is "institutional reform litigation"—cases in which inmates of prisons or of institutions for the mentally disabled challenge, on constitutional grounds, the degrading, brutal conditions in which they are frequently made to live. In the final chapter, against the background of the functional justification offered in chapter 4, I discuss the issue of the legitimacy of noninterpretive review in institutional reform cases. In particular I take issue with much recent commentary, by Nathan Glazer and others,[26] critical of the activist role the lower federal courts have assumed—appropriately, in my view—in reviewing complaints brought by prisoners and the institutionalized mentally disabled.*

In one sense, of course, the fundamental problem addressed in this book—the legitimacy of constitutional policymaking by the judiciary—is old, even if certain terms, such as *interpretive* and *noninterpretive*, are of recent coinage (and, in my view, quite useful). But the problem is also

*A court is *activist*, in my use of the term, if, and to the extent that, it exercises noninterpretive review (supplanting policy choices made by electorally accountable governmental officials with policy choices of its own), and *passivist* if, and to the extent that, it confines itself to interpretive review (making no policy choices of its own, but simply safeguarding policy choices constitutionalized by the framers). Of course, there are degrees of activism and passivism, and a court that is activist, to some degree, with respect to one matter—freedom of expression, say—may be passivist, to some degree, with respect to another. For a different use of the terminology, *see* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1–2 & n.* (1980).

perennial. What Woodrow Wilson said of the question of the proper relationship between the federal government and the governments of the states we can certainly say of the question addressed throughout this book—that it "cannot . . . be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."[27] The challenge faced by the contemporary constitutional theorist is to discuss the perennial, fundamental problem of legitimacy in a manner that escapes this relentless judgment by Robert McCloskey:

> American constitutional history has been in large part a spasmodic running debate over the behavior of the Supreme Court, but in a hundred seventy years we have made curiously little progress toward establishing the terms of this war of words, much less toward achieving concord. . . . [T]hese recurring constitutional debates resemble an endless series of re-matches between two club-boxers who have long since stopped developing their crafts autonomously and have nothing further to learn from each other. The same generalizations are launched from either side, to be met by the same evasions and parries. Familiar old ambiguities fog the controversy, and the contestants flounder among them for a while until history calls a close and it is time to retire from the arena and await the next installment. In the exchange of assertions and counter-assertions no one can be said to have won a decision on the merits, for small attempt has been made to arrive at an understanding of what the merits are.[28]