Introduction

The purpose of this book is to explain how judicial review can be justified in a country like our own, which is committed to democratic self-rule but also to the freedom and equality of all of its members. A striking feature of the contemporary American political landscape is the prominence of the judiciary in making important constitutional choices that many other democratic countries leave to the people or to their elected representatives. There used to be something characteristically American about turning the most divisive political questions into legal questions with the hope that courts could answer them and thereby defuse political conflict. At the same time, the practice of judicial review has engendered understandable worries about the appropriate relationship between legislative and judicial power. Alexander Bickel once referred to judicial review as a "deviant institution" in a democracy.[1] A number of conservative critics of judicial activism have used what Bickel called the "counter-majoritarian difficulty" in trying to show that the judiciary is the most dangerous branch.[2] Robert Bork has written, "The progression of political judging, judging unrelated to law, . . . has greatly accelerated in the past few decades and now we see theorists of constitutional law urging judges on to still greater incursions into Americans' right of self-government."[3] According to Bork, America is "helpless before an antidemocratic, indeed a despotic, judiciary."[4] Lino Graglia has alleged

[1] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New Haven, CT: Yale University Press, 1962), 18.
[2] See, e.g., Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, MA: Harvard University Press, 1977).
[3] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990), 351.
[4] Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996), 119.

that "the Constitution has been made the means of depriving us of our most essential right, the right of self-government."[5]

These critiques do not only come from conservatives. Robert Dahl has maintained that alternatives to political decision making that take political power out of the hands of the people are unacceptably elitist.[6] Mark Tushnet and Larry Kramer have formulated theories of popular constitutionalism to undermine judicial supremacy.[7] Today, the ideological composition of the federal judiciary has led conservatives to be less concerned with the outcomes of important cases and thus less preoccupied with the purported abuse of judicial power than in the past. But surely, our worries about the legitimacy of judicial review should not ebb and flow with partisan change. What is at stake is nothing less than the best understanding of the constitutional limits on the coercive power of the state and the proper approach to judicial decision making to ensure that the state respects those limits. The U.S. Supreme Court usually has the final word on constitutional controversies, and the results that the Court reaches often divide Americans along partisan lines. In the June 2007 term, more than a third of the argued cases were decided by a single vote.[8]

In this book, I put forth a defense of judicial review that attempts to transcend partisanship by explaining how judges should decide the most difficult constitutional cases involving fundamental rights and equal protection.[9] I focus on the kinds of reasons that not only would render legislation constitutional, but also would legitimize judicial decisions.[10] That project may not matter to those who care only about results, but no principled defense of judicial review can succeed unless people can separate results from the reasons that judges use in their opinions as justification for those results. Even when people disagree on how a hard constitutional case ought to be decided, they still might recognize the adequacy of the reasons that support

[5] Lino A. Graglia, "Constitutional Law without the Constitution," in *A Country I Do Not Recognize: The Legal Assault on American Values*, ed. Robert H. Bork (Stanford, CA: Hoover Institution Press, 2005), 2.

[6] See Robert A. Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), 187–8.

[7] Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton, NJ: Princeton University Press, 1999); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004).

[8] Anthony Lewis, "The Court: How 'So Few Have So Quickly Changed So Much,'" review of *The Nine: Inside the Secret World of the Supreme Court*, by Jeffrey Toobin, 54 *New York Review of Books*, December 20, 2007, 58.

[9] With respect to the former, I address only negative rights, that is, rights against state interference.

[10] Cf. Sonu Bedi, *Rejecting Rights: The Turn to Justification* (New York: Cambridge University Press, 2009). Bedi's provocative book argues for the conclusion that the acceptance of a principle of justification has a radical implication: the rejection of constitutional rights as the analytical framework for deciding constitutional cases that involve personal freedom and equal protection.

the result that they do not agree with.[11] One of the aims of this book is to convince readers that they must care more about the method than about the outcome.

I. CONSTITUTIONAL ADJUDICATION

At the outset, I posit that judges have to look outside the law for normative guidance.[12] They are not interpreting a novel or a poem but are expounding a constitution, and their interpretive errors, unlike those of literary critics, may have serious consequences. In hard cases, judges cannot simply discern constitutional meaning from the words of the text, from constitutional structure, from authorial intent, from the original linguistic context, from the case law, or from a combination of these factors.[13] On the contrary, judges must adjudicate; they do not simply gloss a text but assess the reasons that the state has offered on behalf of the law in question. At the point of application, they must bridge the gap between abstract constitutional clauses, such as due process and equal protection, and the particular facts of the case. In doing so, they also must offer their own reasons to support their decision to uphold or strike down the law whose constitutionality is being challenged.[14] It is difficult to imagine what else they could do when they have to decide, but the standard sources of law do not single out a clearly correct answer.[15] Nevertheless, conservative critics of judicial activism continue to accuse liberal judges of bridging those gaps illegitimately by basing their decisions on their own convictions of political morality.[16] Today, liberal critics also increasingly accuse conservative judges of inserting their own preferences into constitutional law.

[11] See Steven J. Burton, *Judging in Good Faith* (New York: Cambridge University Press, 1992), xii.

[12] See Laurence H. Tribe, *The Invisible Constitution* (New York: Oxford University Press, 2008), 7.

[13] See Stephen Macedo, *The New Right v. The Constitution* (Washington, D.C.: Cato Institute, 1987), 10.

[14] Ronald Dworkin insists that people can share an abstract concept, such as fairness, but disagree as to how that concept should be specified in particular instances. See Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, Belknap Press, 1986), 70; Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Harvard University Press, Belknap Press, 2006), 11–12. For his original account of the difference between a concept and a conception, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 134.

[15] See Dworkin, *Taking Rights Seriously*, 134.

[16] For example, Mark Levin alleges that activist judges "have abused their constitutional mandate by imposing their personal prejudices and beliefs on the rest of society." Mark R. Levin, *Men in Black: How the Supreme Court Is Destroying America* (New York: Regnery Publishing, 2005), 10.

Whatever one thinks about the truth of those accusations, it makes no sense to allege that judges have abused their power for failing to limit themselves to appropriate reasons unless there can be some rational manner of determining what kinds of reasons are appropriate in the first place.[17] In a constitutional democracy, a judicial decision cannot be legitimate if it is based on transparently nonlegal reasons. The commitment to rely upon the right kinds of reasons in the decision-making process is the essence of the judicial duty to uphold the law. No one in our legal culture thinks that a judge is authorized to rule against a litigant because she is Filipina or a woman. Similarly, a judge may not rely directly on "deep reasons," like those that are derived from their personal religious convictions, to strike down or uphold a particular law.[18] This widely shared principle can illuminate why some people were understandably disturbed when Justice Clarence Thomas once cast his opposition to affirmative action in Christian terms.[19] The trouble is not that Thomas has religious views or that those views shape his understanding of political morality when he assumes the role of citizen and votes in local, state, and national elections. Rather, the trouble lies in the fact that he might use those sorts of reasons as his primary reasons for striking down a particular affirmative action program, as if those reasons were appropriate in the context of constitutional adjudication.

A judge who upheld a law that banned sodomy on the ground that homosexuality is sinful or unnatural also would have relied on an inappropriate reason.[20] However, beyond this consensus, knowledgeable people disagree about exactly what kinds of reasons would qualify as legal reasons for purposes of constitutional adjudication. Not only do narrow and broad definitions of *legal* compete with one another, but also judges are divided over the force of such reasons in real cases. Some judges would promote economic efficiency or wealth maximization, others would further distributive justice, others would protect property rights, others would adhere to

[17] See Sotiros A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (New York: Oxford University Press, 2007), 19.

[18] As Lawrence Solum points out, if most judges were to rely on their deepest moral or religious beliefs, then moral and religious divisions in our society would "directly translate into legal divisions" and our courts would be divided along such lines. See Lawrence B. Solum, "Pluralism and Public Legal Reason," 15 *William and Mary Bill of Rights Journal* (2006), 12. One exception is Stephen Carter, who believes that "reliance by judges on religious convictions is as proper as reliance on their personal moral convictions of any other kind." Stephen L. Carter, "The Religiously Devout Judge," 64 *Notre Dame Law Review* (1989), 933.

[19] Armstrong Williams, "Two Wrongs Don't Make a Right for Thomas," *Charleston Post and Courier*, August 17, 1995, A-13.

[20] It is more common for the state to rely on such reasons. For instance, in *Bowers v. Hardwick*, the brief of the state "asserted that Georgia could reasonably believe that homosexuality . . . 'epitomizes moral delinquency.'" See William N. Eskridge Jr., *Dishonorable Passions: Sodomy Laws in America 1861–2003* (New York: Viking Books, 2008), 240.

precedent or constitutional structure, others would look toward natural law, others would construct political compromises, others would defer to legislative majorities, others would foster civic virtues, and others would discover the original meaning of constitutional provisions.

Despite their differences, all of these diverse approaches to constitutional adjudication are predicated on the belief that judges who act in good faith must limit themselves to certain reasons in the decision-making process even when those reasons lead to a result that they dislike. A theory of constitutional adjudication must distinguish between relevant and irrelevant reasons, and it also must rank the relevant reasons according to their putative force. Otherwise, that theory would be incapable of providing the minimal guidance that a judge would need to decide a real case. On the assumption that most judges act in good faith most of the time, the real concern is not that runaway judges are inclined to abuse their power by legislating, but that they may be sincerely relying on the wrong kinds of reasons when they decide constitutional cases. Americans should care much less about the motives that lead to so-called judicial imperialism and much more about the reasons that underlie the most important constitutional decisions.[21] They should be troubled when a judge does not fulfill his or her judicial duty by upholding an unconstitutional law. Since the era of the Warren Court, liberals have had to defend their uses of judicial power as if there were an unwritten rule against such uses, while conservatives, who cloak themselves in the mantle of judicial restraint, have not had to justify their refusal to invalidate laws that should be invalidated.[22] Unfortunately, this defensive posture on the part of liberals allows conservatives to frame the debate over judicial review in a manner that not only serves conservative partisan ends by making it seem as if any decision that departs from the plain or original meaning of the constitutional text is illegitimate, but also obscures what should count as a good answer to a difficult constitutional question.

II. PUBLIC JUSTIFICATION

If law is not merely the extension of politics by other means, then there are better and worse answers to at least some constitutional questions, and the quality of those answers is contingent on the reasons that judges have offered in their opinions. A good theory of constitutional adjudication must

[21] If we take what they say in their opinions at face value, their reasons are transparent; the same cannot be said for their motives.

[22] As Stephen Macedo writes, "Judicial deference ... is not an avoidance of choice. Rather, it is a choice of majority power over individual liberty." Macedo, *The New Right v. The Constitution*, 27.

not only guide judges in making the best choice among the remaining plausible reasons after they have eliminated the bad ones but also must explain their plausibility. An even better theory of constitutional adjudication would include an independent normative standard to help the electorate decide which of those underlying reasons was most plausible and thus most likely to lead to the right answer in a particular constitutional controversy. Such a standard must distinguish a good constitutional argument from a bad one and a better one from a worse one when two or more of the arguments are not bad. The standard that I offer in this book is public justification. A legitimate decision is one that crosses the threshold of public justification, and the best decision is the one that is most publicly justified, that is, the one based on the strongest public reasons.

My concern with the public justification of public laws and judicial decisions is not only prudential in that a society whose laws are not sufficiently publicly justified is prone to constitutional crises. A decent society articulates the reasons that underlie its actions even when public officials would prefer to exercise their authority without attempts at justification. An even better society publicly justifies its most important laws to respect the freedom and equality of all of its members. The failure to do so not only would make some people's lives worse than they otherwise would be, but also would put into doubt the fairness of the American political system. When ordinary people have very little political influence, they are entitled to know the reasons that the state relies on when it exercises its coercive power over them. As I shall show, judges may legitimately invalidate laws that have clearly failed to meet the standard of public justification that I defend in this book. When the state puts forth reasons in a particular constitutional case that turn out to be insufficiently public, and a court rejects those reasons, that exercise of judicial review is warranted. After all, those reasons should not have been the basis of a statutory prohibition or classification in the first place.

I also explain how this standard of public justification limits the interpretive latitude that judges have when they decide real cases and thereby addresses the traditional concern that judicial discretion is too unconstrained to be consistent with the rule of law. Public justification is about the kinds of reasons that justify the uses of the coercive power of the state.[23] In hard constitutional cases, I do not sharply distinguish between legal and nonlegal reasons for two main reasons. First, when real judges have to decide

[23] Initially, John Rawls described the U.S. Supreme Court as "the exemplar of public reason." See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 231. Later, he wrote that public reason applies to the discourse of all judges in their decision making, and especially to those on the U.S. Supreme Court, and then added that public reason applies more strictly to judges than to citizens and their elected representatives. See John Rawls, "The Idea of Public Reason Revisited," in *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 133–4.

such cases and have already ruled out undeniably nonlegal reasons, they are frequently divided over which reasons are sufficiently legal and what force they ought to have. Judges must have the discretion to choose from a wide range of reasons and must be able to do so openly. Second, such cases present questions of public morality, and it is disingenuous for judges to pretend otherwise. Our understanding of the role that the judiciary should play in our politics will improve only when more people understand that constitutional adjudication is value laden, and a strict separation between legal and other kinds of reasons only conceals what judges do and must do in the most challenging constitutional cases.

Such a separation also makes it more difficult for them and us to evaluate the reasons that the state has offered on behalf of the law in question. Judges must accept only certain sorts of reasons as justification for statutes and must render a law unconstitutional when voters or legislators have failed to limit themselves to those reasons.[24] That is the defense of judicial review that lies at the center of this book. Judges serve as gatekeepers who ensure that the state does not act on the wrong kinds of reasons when it exercises or threatens to exercise its coercive power. The more significant the impact of the law, the more that law must be justified in the eyes of those who are burdened by it. That is not to say that the state can never clear this hurdle. For example, laws that prohibit murder, rape, assault and battery, theft, and fraud are unquestionably publicly justified. A reasonable person would understand why those actions are harmful and therefore criminal. A law that requires abortion, prevents interracial marriage, criminalizes premarital sex, or denies women access to education is clearly not publicly justified. There should be a strong presumption against laws that undermine freedom and equality that the state can overcome only if it can produce compelling reasons. The requirement of public justification, then, functions as a constraint on state action, and through the exercise of judicial review, judges determine when lawmakers have exceeded their authority.

It follows that judges should introduce only certain reasons to support their own constitutional conclusions. When they invalidate a law, judges must explain why the reasons that the state has offered on behalf of the law in question fall short of the standard of public justification. When they decline to invalidate a law, they must defend its constitutionality by showing that its underlying reasons are compelling. Reasons based on religious convictions and what Cass Sunstein calls "naked preferences" are not

[24] Although Rawls himself did not fully develop an ideal of legal or constitutional reason, "it is clear that a Rawlsian ideal of public reason has important implications for fundamental debates in legal theory." See Lawrence B. Solum, "Public Legal Reason," 92 *Virginia Law Review* (2006), 1474.

compelling.[25] Reasonable people could reject such reasons on the ground that they are too sectarian or are at variance with the public good. In addition, in the spirit of John Rawls, I contend that judges must not allow voters and legislators to appeal to the "truth" of their conceptions of the good life or their visions of a good society when they enact laws that undermine freedom and equality.

That contention is bound to be controversial and perhaps is counterintutive. In most settings, such appeals are not only commonplace but also perfectly acceptable. Normally, we do not censure people for relying on their deepest convictions in their public deliberations and voting behavior, and we may even admire them for remaining faithful to their consciences and being candid with us. As I see it, though, a higher standard of public justification would serve as a more meaningful constitutional limit on the coercive power of the state. In the realm of constitutional adjudication, reasons derived from deeper convictions are inappropriate because reasonable people are likely to be justified in not accepting such reasons. When judges are trying to decide a case on the basis of public reasons, they must write an opinion with a particular audience in mind, namely those who are likely to disagree with the decision, and try to convince them by giving them adequate reasons.[26] This task is especially important when judges decide to uphold a law that infringes upon personal freedom or treats some people unequally. In turn, dissenters should accept only reasons that are consistent with their freedom and equality.

Although my theory of constitutional adjudication as public justification is ideal, it is not far removed from constitutional history and practice. Consider the following examples. The strong presumption against the constitutionality of content-based restrictions and viewpoint discrimination in free speech law and the requirement that a statute have a secular purpose in establishment clause jurisprudence reflects the importance of the state's relying upon reasons that should be acceptable to everyone.[27] Justice Sandra Day O'Connor's endorsement test has a similar rationale; it is premised on the principle that the state may not send a message to "nonadherents that they are outsiders, not full members of the community."[28] The state may not enact a religious display, such as a nativity scene, that a reasonable observer would construe as the state's favoring one religion over others.[29] Similarly,

[25] Cass R. Sunstein, "Naked Preferences and the Constitution," 84 *Columbia Law Review* (1984), 1689–732.

[26] Cf. City of Cleburne v. Cleburne Learning Center, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) ("I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case" (which required a special permit for the establishment of homes for the mentally retarded).

[27] See Lemon v. Kurtzman, 403 U.S. 602 (1970).

[28] Lynch v. Donnelly, 465 U.S. 668 (1984).

[29] See, e.g., Allegheny County v. American Civil Liberties Union, 492 U.S. 573 (1989).

in equal protection clause jurisprudence, the state can neither classify certain people on the basis of certain immutable traits nor ground legislation in reasons that reasonable dissenters could never accept, such as stereotypes, contempt, or moral disapproval of lifestyle.[30] The importance of protecting a "discrete and insular minority" is based on the principle that people who lack political resources should not be at the mercy of legislative majorities.[31]

The preceding constitutional principles have this much in common: certain reasons, namely those that are too self-serving or sectarian, should not serve as the moral basis of certain laws. It is not always morally acceptable, in other words, for legislative majorities to take advantage of their superior position in the legislative process and give their views the force of law. The presence of nonpublic reasons often renders a particular law constitutionally suspect, and those reasons also explain why certain infamous constitutional cases, which are almost universally regarded as wrongly decided, were wrongly decided, at least in retrospect. In *Dred Scott*, the *Civil Rights Cases*, *Plessy v. Ferguson*, and *Korematsu*, neither the state nor the Court was able to come up with a sufficiently public argument, that is, an argument that the victims of such racial discrimination could have been expected to accept. Nor could a religious minority like the Jehovah's Witnesses have accepted the kinds of reasons that the Court offered in *Gobitis* to support the conclusion that their children could be required to salute the American flag in public schools.[32] The defendants in *Smith*, the infamous peyote case, could not have been expected to accept the majority's view that a court need not balance the state's interest in prohibition against the burden on the practice of their religion.[33]

The assumption that an unconstitutional law is not publicly justified can help to explain the outcome of some of the best-known, correctly decided fundamental rights and equal protection cases. That assumption also can illuminate the fundamentals of constitutional criminal procedure. No one wants to return to the days of coerced confessions, and a society that allows defendants who have been acquitted by a jury of their peers to be tried over and over again until the prosecution can obtain a conviction is not a society that most of us would want to live in. When people have been charged with a crime, they have a number of constitutional rights that ensure that they are able to defend themselves against those charges effectively in an adversarial system of justice. It would be unthinkable for the Court to allow a legislature to take away the rights to be informed of the charges against them, to

[30] See, e.g., U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973); Romer v. Evans, 517 U.S. 620 (1996); Lawrence v. Texas, 539 U.S. 558 (2003).
[31] The phrase "discrete and insular minority" comes from Justice Harlan Stone's famous footnote 4 in United States v. Carolene Products, 304 U.S. 144 (1938).
[32] Minersville School District v. Gobitis, 310 U.S. 586 (1940).
[33] Employment Division v. Smith, 494 U.S. 872 (1990).

counsel, to discovery, to be given exculpatory evidence, to an impartial jury, to a speedy trial, and so forth. While most academics and legal professionals would describe these principles as rooted in procedural due process, another way to characterize the reasons that make a fair trial possible is that they are those that a reasonable person would consider essential to the fairness of the criminal justice system. Anyone who is charged with a crime would want and always does want to exercise the preceding rights. When people want to know whether the reasons offered in support of these rights are sufficiently public, they must ask themselves whether they, in the position of a criminal defendant, would insist on having those rights. If they would, then those reasons are likely to be sufficiently public. As always, the challenge is to answer the following question as honestly as possible: is that how I would like to be treated if I or someone I care about were in the same or similar circumstances?

III. REASONABLE DISSENTERS

The standard of public justification that I shall articulate and defend in this book is based on the unfairness of the state's reliance upon inappropriate reasons in some circumstances, and legitimate judicial decisions adequately explain whether the reasons that support the law in question are sufficiently public. Such decisions are not necessarily those that Americans actually accept at a given moment – surely, real people can be unreasonable – but those that an ideal reasonable dissenter would consider good enough.[34] There is a continuum, ranging from unarguably legitimate at one extreme to unarguably illegitimate at the other extreme. Whether a judicial decision is legitimate turns on the reasons that judges have mustered on its behalf. Although the content of those reasons will vary from case to case, judges who care about public justification should always address those who are likely to disagree with the result. Such an attempt is especially important

[34] I borrow the idea of reasonable rejectability from T. M. Scanlon, "Contractualism and Utilitarianism," in *Beyond Utilitarianism*, ed. Amartya Sen and Bernard Williams (New York: Cambridge University Press, 1984), 110. The difference between accepting a reason and not rejecting a reason is not only semantic. Instead, this difference goes to the heart of whether a particular law is publicly justified. To accept a reason is to see that reason as good enough for making one choice rather than another; that reason appears to be better than the other reasons, all things considered. To not reject a reason is to see that reason as not too bad to support the choice to be made, even if there are other reasons that the person making the judgment sees as stronger. This means that a person may believe that reason A is better than reason B and therefore, leads to a particular conclusion. At the same time, that person may also believe that reason B, which supports the opposite conclusion, should not be rejected because a reasonable person could believe that reason B is good enough. By "good enough," I mean that it does adequate justificatory work from an impersonal standpoint. For convenience, I use "would accept" and "could not reasonably reject" interchangeably.