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Introduction: A (Partial) Theory of Judicial Review

> The first virtue of any theory of constitutional adjudication is a theory of judicial review – of judicial power to override legislative commands.[1]

The Constitution of the United States establishes the national government – or, as it is typically called, the federal government – and allocates power (1) among the three branches (legislative, executive, and judicial) of the national government, and (2) between the national government and the governments of the states. The Constitution also limits the power of government. Most of the Constitution's power-limiting provisions, such as the Eighth Amendment's ban on cruel and

[1] Adrian Vermeule, "Common Law Constitutionalism and the Limits of Reason," 107 Columbia L. Rev. 1482, 1532 (2007).

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unusual punishments, articulate what we today call "human rights." I am concerned in this book with the proper role of the Supreme Court of the United States in enforcing the Constitution's power-limiting provisions – in enforcing, that is, the human rights articulated by those provisions. My animating concern, in short, is the Court's proper role in enforcing constitutionally entrenched human rights.

Consider the following twofold proposition, which is so uncontroversial as to be banal: That a law (or other government policy) is morally objectionable or otherwise woefully misguided does not mean that the law violates the Constitution; so, that a law is woefully misguided does not mean that the Supreme Court (or any other court) should rule that the law is unconstitutional. (As Supreme Court Justice Thurgood Marshall was fond of saying: "The Constitution does not prohibit legislatures from enacting stupid laws.")[2] Now, consider a second proposition, which *is* controversial, and which I defend in this book: That the Court (or a majority of it) believes that a law is unconstitutional – for example, a law authorizing the imposition of capital punishment – does not mean that the Court should rule that the law is unconstitutional.

[2] See David Stout, "Justices Back New York Trial Judge System," New York Times, January 16, 2008 (quoting Justice John Paul Stevens quoting his "esteemed former colleague, Thurgood Marshall").

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Relatedly, that a citizen – even a citizen who is, *mirabile dictu*, a constitutional scholar! – believes that a law is unconstitutional does not mean that he should want the Court to rule that the law is unconstitutional. It is quite common for constitutional scholars, once they have argued that a law is unconstitutional, to conclude or imply that the Court should so rule (or that the Court was justified in so ruling) without realizing that they need a further argument to support the proposition that the Court should so rule.[3] However, whether a law is unconstitutional and whether the Supreme Court should so rule are distinct questions: The answer to each question may be affirmative, but that the answer to the former question is affirmative, as I explain in this book, does not entail that the answer to the latter question is affirmative.[4]

[3] For a prominent recent example of this phenomenon, see Jack M. Balkin, "Abortion and Original Meaning," 24 Constitutional Commentary (2007); available at http://ssrn.com/abstract=925558.

[4] In this book, I typically talk about the constitutionality of laws and other government policies. (A law necessarily represents a government policy.) But constitutional cases do not always seem to involve the constitutionality of a law or other government policy; constitutional cases sometimes involve the constitutionality of a government official's (for example, a policeman's) behavior. Nonetheless, such cases do involve – they necessarily (if implicitly) involve – the constitutionality of a government policy – namely, the policy of permitting the government official to engage in the behavior at issue. If a law or other government policy forbade the official to engage in the behavior at issue, the question of the constitutionality of the behavior would not need to be addressed; if, however, no government policy forbids the official to engage in the behavior, the constitutional question must be

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This book is, in part, an essay in constitutional theory. In the United States, constitutional theory comprises two main questions:

1. What does it mean – or, at least, what *should* it mean – to "interpret" a constitutional provision? For example, how should one go about deciding what "cruel and unusual" means in the Eighth Amendment's ban on cruel and unusual punishments?
2. What is the proper role of the courts in enforcing a constitutional provision? More precisely, should the courts be deferential – or not – in enforcing a constitutional provision: Should the courts strike down a law claimed to violate a constitutional provision if they agree that the law violates the provision, or, instead, should they strike down the law only if they conclude that the counterclaim that the law does not violate the provision is unreasonable?

Although in the last thirty years or so constitutional scholars have devoted ample attention to the first question, they have largely neglected the second question. This book is in part an effort to correct that state of affairs.

addressed. And to rule on the constitutionality of the behavior is necessarily to rule on the constitutionality of government's permitting the official to engage in the behavior.

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Not that I neglect the first question: My discussion of the constitutionality of capital punishment (Chapter 3), of state refusals to extend the benefit of law to same-sex unions (Chapter 4), and of state bans on pre-viability abortions (Chapter 5) presupposes an "originalist" answer to the first question, and I explain and defend that answer in Chapter 3. (Aren't we all – well, almost all – originalists now?[5] To be an originalist is not necessarily to believe that the judiciary should overturn every constitutional doctrine that cannot be justified on an originalist basis. Some such doctrines, after all, have achieved the status of what I have elsewhere called "constitutional bedrock": They are well-settled and there is no significant support – in particular, among the political elites – for abandoning the doctrines.)[6] But this book is mainly about – I spend most of my time in this book addressing – the second question, and *what I say in this book in response to the second question does not depend on what I say in response to the first*. In responding to the second question, I elaborate, defend, and illustrate (what I call) the Thayerian approach to constitutional

[5] See Chapter 3, n. 2.

[6] See Michael J. Perry, We the People: The Fourteenth Amendment and the Supreme Court 19–23 (1999). "Making room for stare decisis in the practice of originalism does not make one unprincipled or inconsistent; it merely reflects a normatively grounded theory of constitutional interpretation." Kurt T. Lash, "Originalism, Popular Sovereignty, and *Reverse* Stare Decisis," 93 Virginia L. Rev. 1437, 1481 (2007). (Lash's important article is well worth reading.)

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adjudication. The question whether one should accept the originalist approach – or, at least, *an* originalist approach – to constitutional interpretation and the question whether one should accept the Thayerian approach to constitutional adjudication are entirely distinct questions; an affirmative answer to the former question does not entail an affirmative answer to the latter, nor does a negative answer to the former question entail a negative answer to the latter. Again, I am mainly concerned in this book with the latter question.

Caveat emptor. One of my principal concerns in this book is how, given what the Constitution means, the Supreme Court should resolve certain constitutional controversies. So, in the chapters that follow – in particular, the chapters in which I address the constitutional controversies concerning capital punishment, same-sex unions, and abortion – I am interested in what the Constitution means, not in what the Supreme Court says it means. There are more than enough materials in the marketplace for readers who want to know what the Court says the Constitution means, and more than enough materials, too, for readers looking for commentary on how, given what the Court says the Constitution means – given, that is, existing constitutional doctrine, some of which is quite misguided – the Court should resolve one or another constitutional controversy.

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In this book, I continue to pursue an inquiry I began in the final part of my previous book, *Toward a Theory of Human Rights* (2007). The approach to constitutional adjudication – the theory of judicial review – I defend in this, my tenth book, is different, to say the least, from the approach I defended in my first book, *The Constitution, the Courts, and Human Rights* (1982), which was published over a quarter century ago. "Only the hand that erases can write the true thing," said Meister Eckhart.

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CHAPTER ONE

Human Rights: From Morality to Constitutional Law

My aim in this chapter is to provide some conceptual and normative background and context for the rest of the book. I do so by addressing three questions: What is the morality of human rights; that is, what is the morality that grounds the law of human rights? How does the morality of human rights ground the law of human rights? Why do most liberal democracies – including the United States – entrench some human rights laws in their constitutions?

I. The morality of human rights

Although the morality of human rights is only one morality among many, it has become the dominant morality of our time; indeed, unlike any morality before it, the morality of

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human rights has become a truly global morality.[1] (Relatedly, the language of human rights has become the moral *lingua franca*.)[2] Nonetheless, the morality of human rights is not well understood. What does the morality of human rights hold?

The International Bill of Rights, as it is informally known, consists of three documents: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.[3] The Universal Declaration refers,

[1] This is not to say that the morality of human rights is new; in one or another version, it is a very old morality. See Leszek Kolakowski, Modernity on Endless Trial 214 (1990) (explaining that "the notion of the immutable rights of individuals goes back to the Christian belief in the autonomous status and irreplaceable value of the human personality"). Nonetheless, the emergence of the morality of human rights in international law, in the period since the end of World War II, is a profoundly important development: "Until World War II, most legal scholars and governments affirmed the general proposition, albeit not in so many words, that international law did not impede the natural right of each equal sovereign to be monstrous to his or her subjects." Tom J. Farer & Felice Gaer, "The UN and Human Rights: At the End of the Beginning," in Adam Roberts & Benedict Kingsbury, eds., United Nations, Divided World 240 (2d ed. 1993).

[2] See Jürgen Habermas, Religion and Rationality: Essays on Reason, God, and Modernity 153–54 (Eduardo Mendieta, ed., 2002): "Notwithstanding their European origins, . . . [i]n Asia, Africa, and South America, [human rights now] constitute the only language in which the opponents and victims of murderous regimes and civil wars can raise their voices against violence, repression, and persecution, against injuries to their human dignity."

[3] The Universal Declaration was adopted and proclaimed by the General Assembly of the United Nations on December 10, 1948. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which are treaties and as such are binding on the several state parties thereto, were meant, in part, to elaborate the various rights specified

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in its preamble, to "the inherent dignity . . . of all members of the human family" and states, in Article 1, that "[a]ll members of the human family are born free and equal in dignity and rights . . . and should act towards one another in a spirit of brotherhood." The two covenants each refer, in their preambles, to "the inherent dignity . . . of all members of the human family" and to "the inherent dignity of the human person" – from which, the covenants insist, "the equal and inalienable rights of all members of the human family . . . derive."[4]

in the Universal Declaration. The ICCPR and the ICESCR were each adopted and opened for signature, ratification, and accession by the General Assembly of the United Nations on December 16, 1966. The ICESCR entered into force on January 3, 1976, and as of June 2004 had 149 state parties. The ICCPR entered into force on March 23, 1976, and as of June 2004 had 152 state parties. The United States is a party to the ICCPR but not to the ICESCR. In October 1977, President Jimmy Carter signed both the ICCPR and the ICESCR. Although the United States Senate has not ratified the ICESCR, the Senate in September 1992, with the support of President George H. W. Bush, ratified the ICCPR (subject to certain "reservations, understandings and declarations" that are not relevant here; see 138 Cong. Rec. S 4781–84 (daily ed. April 2, 1992)).

[4] The relevant wording of the two preambles is as follows:

> The State Parties to the present Covenant,
>
> Considering that . . . recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.
>
> Recognizing that these rights derive from the inherent dignity of the human person. . . .
>
> Agree upon the following articles: . . .

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