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New Ways of Looking at Old Institutions

Richard W. Bauman and Tsvi Kahana

This book seeks to redress an imbalance. Over the past few generations, scholars who study processes of constitutional lawmaking – including modes of creation, interpretation, and application – have focused largely on how courts work with constitutions. Rival theories of adjudication, whether dealing with how power is allocated in a modern state or with how rights are to be protected in light of constitutional guarantees, have been intricately constructed. Just as theories along this line have proliferated, so too have empirical studies of the performance of judges as constitutional oracles and referees.

Less attention has been paid to how legislatures, executive officials, or administrative agencies have interpreted their responsibilities to make or revise or implement constitutions. Of these branches, legislatures are the prime focus of this book. How do they respect (or occasionally overstep) constitutional boundaries? When and for what ends do they reverse the constitutional decisions of courts? How do legislatures create new forms of constitution-like instruments, doctrines, and principles? Moreover, how do they realize or make concrete the ideals that underpin a constitutional democracy? Are there discrepancies between what a constitution envisions by way of democratic processes or values and how legislatures operate in fact? In response to such questions, this book offers theoretical perspectives from a multidisciplinary group of authors. The work of legislatures, illustrated by examples derived predominantly from North America, is described as well as normatively assessed.

The systematic neglect of legislatures by legal and political philosophers has been noted by, among others, Jeremy Waldron. The work of legislatures has a bad reputation for being rife with "deal-making, horse-trading, log-rolling, interest-pandering, and pork-barrelling."[1] The rumbustious process of enacting or defeating statutes, issuing regulations, holding committee inquiries, engaging in debates over government policy, and making appointments has traditionally not earned the same respect as the development of common law. The latter is viewed as aspiring to a principled basis, whereas lawyers and political scientists have long doubted whether legislators are primarily motivated by anything other than self-interestedly maintaining power or else lusting after it. As Waldron points out, legislatures as legitimate and authoritative sources of law have been "under-theorized."[2] To embark

[1] Jeremy Waldron, *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999) at 2.
[2] Ibid. at 3.

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now on such a theoretical project requires legal and political philosophers to turn their attention away from judicial reasoning or the role of courts as guardians of rights that majorities will be prone to trample, and to become more comfortable with, and informed about, democratic structures involving a plurality of political agents and the types of lawmaking that arise in practical settings that prize disagreement and diversity.[3]

Alongside the plea for a better and more accurate conception of the legislative process, doubts have been expressed about whether courts in constitutional democracies should have the exclusive or final word on what the constitution means. Mark Tushnet, for example, has written on the contingent nature of judicial review.[4] He doubts whether courts need to perform this task and, even if they do, whether they are so uniquely suited to the job of interpreting the constitution as some theorists claim. In his assessment of constitutional litigation, what often appear to be victories by rights-claimants have an underside that masks a lack of social progress on important policy issues.[5] Tushnet has offered instead a theory of "populist constitutional law" that takes to heart the ideals of dialogue and democratic self-government and that gives the constitution back to the citizens.[6] More recently, Larry Kramer has pointed out how judicial supremacy in the United States was not part of the original scheme of government but only became the rule later.[7] On the palimpsest of U.S. history is still written an older tradition, according to which citizens consider the meaning of the Constitution to be their prerogative: They refuse to recognize a judicial monopoly on constitutional interpretation. Kramer deplores the efforts to efface this tradition and treat U.S. constitutional history as "a story of judicial triumphalism" and Supreme Court doctrine.[8] To restore control of the Constitution in the hands of the people, without necessarily abolishing judicial review altogether, Kramer has floated such ideas as limiting the Supreme Court's jurisdiction, changing the appointments process, revising the constitutional amending procedure, and setting age or term limits for Supreme Court justices.[9]

This more positive and populist conception of self-government, according to which the Constitution should not be viewed as primarily constraining political choice, but rather as creating opportunities for citizens to fashion new arrangements in the future, also informs the work of scholars like Christopher Eisgruber. Unlike Tushnet, however, Eisgruber defends judicial review, not as an institution that counters democracy but as an institution that can help democracy flourish.[10] Eisgruber is more sanguine than Tushnet about the possibility that judges, when interpreting the Constitution, act as representatives of the people and therefore can

[3] See Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999) at 10–11.
[4] See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) ch. 7.
[5] See ibid. at 141–52.
[6] See ibid. ch. 8.
[7] See Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004) at 170ff.
[8] Ibid. at 229.
[9] Ibid. at 250–2.
[10] Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge, Mass.: Harvard University Press, 2001).

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speak on their behalf about controversial questions of political or moral principle. Constitutional judgments, instead of foreclosing debate, often stimulate public argument.[11] And, overall, Eisgruber (following in the footsteps of Ronald Dworkin and Owen Fiss) believes that judicial review has worked well in the United States.[12] It works best as a practical device, according to Eisgruber, when it reinforces other democratic institutions. In a similar vein, Lawrence Sager has recently emphasized the successes resulting from judicial review as a constitutional practice.[13] On his theory, the judiciary is in league with popular political institutions – they form a "contemporary partnership" – that "promises a more complete constitutional justice than could be realized by the courts alone."[14]

Whether one prefers the populist mode of thinking espoused by Tushnet and Kramer or the type of defense of judicial review offered by Eisgruber and Sager, it is clear that legislatures are a main player in the constitutional state. Thus, we need to explore the ways in which these representative institutions act democratically vis-à-vis the interpretation and application of a constitution. The challenge is to explain the role of the legislature as an institution that both is constrained by constitutionalism and that promotes the democratic values that lie at the core of constitutionalism.

The book is organized along these lines: The first two parts address democratic theory, the ways in which constitutionalism interacts with democracy and the role of the legislature within these interactions. Part I examines legislatures from the standpoint of democratic theory. Part II looks at legislating and deliberating in a constitutional democracy. The themes then shift from democratic theory to constitutionalism. Parts III and IV examine constitution making by legislatures, whether explicitly through constitutional amendments or implicitly through enacting certain types of legislation. The succeeding two parts discuss legislatures' engagement with the constitution, once adopted. Part V focuses on how legislatures interpret and apply a constitution. Part VI is devoted to recent debates about legislative constitutionalism, or the notion that legislatures, not the courts, should have the final word on constitutional issues. The final section of the book, Part VII, includes chapters that explore how modern legislatures take part in conversation or dialogues, with both courts and with other legislatures, that might be domestic or foreign.

In this book's first part, several authors take aim at traditional accounts of political action and how legislatures ought best to function. They all reject as simplistic the idea that judges and legislators form two quite different categories of public officials. On this view, judges are guided by reason, whereas legislatures are necessarily moved by political passions and rational self-interest. Nor is it accurate to portray courts as domains of principle and legislatures as forums of policy. By contrast with these conventional accounts, Jeremy Waldron in Chapter 1 emphasizes the need for legislators in a constitutional regime to act in a principled way. He invokes some of the values associated with theories of deliberative democracy.

[11] Ibid. at 96.
[12] Ibid. at 210.
[13] Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004).
[14] Ibid. at 7.

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This means that, in making laws, legislators should carefully weigh and argue about a proposed law's purposes and possible consequences. Legislators, as much as judges, are bound to act reasonably and with integrity. The lawmakers bear a heavy responsibility to ensure that their actions are legitimate. Legislators are not simply delegates of electors and therefore they should make their decisions after proper deliberation.

To constrain legislators in their ability to make laws is one (though not the only) function of a constitution. It will also typically provide the institutional design under which legislators (usually by majority rule) engage in specific acts of lawmaking. Thus in the United States as Russell Hardin points out in Chapter 2, the constitutional scheme provides a separation of powers for the national government as a way to protect individual rights. Hardin does not doubt that sometimes legislators are tempted to make decisions while influenced by factors that are not purely deliberative: For example, the legislator will consider political ramifications (such as reelection or future campaign financing) in sponsoring legislation or casting a particular vote. Or, the process of law making might involve political log-rolling, compromise, or bowing to the pressure of lobbyists. Hardin emphasizes the problems for democracy created by lack of knowledge on the part of citizens. They often have little idea what the legislature is doing. With a backward look at the growth of the U.S. republic, Hardin also argues that democracy, on its best account, requires legislators continually to monitor the needs, interests, and values of a nation's citizens.

As her point of departure, Jane Schacter notes in Chapter 3 the minimalist conception of democracy relied on by previous theorists, such as Alexander Bickel or Joseph Schumpeter, who attempted to stipulate the respective spheres of legislatures and courts. Legislators are elected and judges largely are not. This makes all the difference: The popularly chosen legislature is treated as a more legitimate institution for lawmaking because it is more accountable. But this validation of the legislature as the most legitimate makes sense, according to Schacter, only if accountability – indeed, if democracy – is understood in an anemic sense. She offers instead an empirical discussion that identifies problems with different models of accountability. And she turns to a robust conception of democracy that goes beyond mere voting: It includes also conditions requiring an active citizenry, serious deliberation of proposed laws by their representatives, and adherence to norms of equality and justice. In support of her conclusions, Schacter (like Waldron) refers to Condorcet's so-called jury theorem, a principle of political philosophy that holds that decisions made by larger bodies of decision makers are likely to be more rational than smaller ones. Hardin challenges this principle.

In Chapter 4, Chantal Thomas considers one of the contemporary modes by which a legislature can arguably reduce democratic involvement in lawmaking. Her example is the fast-track procedure used in the United States that entitles the executive branch of government to negotiate international trade agreements and then provides an expeditious route for Congress to approve those agreements. This mechanism is difficult to square with such desirable democratic values as widespread public participation in lawmaking, transparency of the political process, and opportunities to revise proposed laws during the process of deliberation. The resultant debates over trade legislation tend to be poorly informed and amount

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to pure formalities. After criticizing these processes on grounds similar to those, Thomas questions whether the fast-track procedure violates the separation of powers contained in the U.S. Constitution. In particular, she probes the issue whether the procedure offends the nondelegation doctrine formulated in the past by the U.S. Supreme Court. She concludes that, though it is unlikely to be invalidated on judicial review, the use of the fast-track mechanism presents opportunities to debate and test different democratic theories.

In Part II of this book, which focuses on legislating and deliberating in the constitutional state, contributors peer closely into how legislators ought to conduct their business, as they operate under the shadow of a constitution in a pluralistic society. In Chapter 5, Jennifer Nedelsky articulates and defends a deliberative approach that should be used by legislatures as well as courts in a constitutional democracy. She emphasizes that good government involves a search for the public good, which Nedelsky (as does Schacter in Chapter 3) differentiates from public opinion. In her conception of democracy, Nedelsky also disputes the idea that reaching agreement on the public good is a matter of aggregating individuals' interests or preferences. Instead, what is required of legislators is an enlarged mentality or judgment, so that they sedulously take into account moral views different from their own. Her primary example of an alternative standpoint that ought to be given weight is the diverse body of religious views held by citizens. Though at first blush Nedelsky's suggestion seems to contradict the liberal foundations of democratic theory, which ordinarily treat religious convictions as irrelevant to an elaboration of constitutional values, she argues that the meaning of core values, such as equality, is best assessed by taking into account multiple perspectives, including nonsecular ones.

Andrei Marmor echoes Nedelsky's claims in favor of plurality and of a legislature's considering all moral views held by citizens, though his account features ideological, rather than religious, diversity. In Chapter 6, he argues that in a constitutional democracy, it would be anathema for the state to enact a particular set of moral doctrines. Democracies are supposed to be marked by value fragmentation and incoherence: In such a crucible, democratic disagreements can thrive. On this ground, Marmor criticizes the work of Ronald Dworkin, who attempts to set up an ideal standard of univocal political morality that should animate both legislators and judges. Marmor doubts (*pace* Waldron, in Chapter 1) whether legislators should be held to a rigorous standard of integrity. The virtue of democratic pluralism is that legislatures should be free to make laws that do not cohere with one another: This is to be expected in systems that permit political compromise, change in governments, and (as in federal states) divisions of legislative power among different levels of government.

To this point in the collection, the authors unite behind the idea that legislatures, as much as the courts, must be capable of applying the constitution in both its federalism and its rights-protection aspects. Very often, the executive branch of government and administrative agencies will also be required to do this. In Chapter 7, Cass Sunstein offers a portrait of the nondelegation doctrine (already referred to earlier by Thomas in Chapter 4), reputedly found in the U.S. Constitution. It prohibits the national government from delegating its power to make law to another body. Sunstein is doubtful about the current status of the doctrine: In the decades since it was announced, it might have fallen by the wayside. Despite this, Sunstein

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contends that important principles or canons of administrative law can usefully be deployed to block attempted improper delegations of power. The upshot of this is constitutional; that is, individual rights are protected because they are not left to the whim of the executive branch or administrative agencies. From his examination of U.S. jurisprudence, Sunstein concludes that these canons are alive, even if the nondelegation doctrine's viability is in question.

In Chapter 8, Harry Arthurs explores the meaning of populist challenges to the institutions of representative democracy. Partly out of a distrust of such indirect democracy, and also many of the features associated with a parliament on the Westminster model, there has been in Canada a steady use of mechanisms such as referenda and plebiscites, the effect of which is to alter constitutional arrangements, even if, as with the case of recent political initiatives, formal constitutional documents do not mention these mechanisms at all. Arthurs analyzes the initiatives used and proposed by populist movements – paying close attention to their rhetoric – and concludes that their common goal is to change structures and processes of government in a way analogous to formal constitutional reform. The impetus behind this phenomenon has not only been from the grass roots up. He traces the extent to which some governments themselves have used populist rhetoric to justify their own particular neoliberal agendas. And, thus, in the end he arrives at a paradox: Much of the impact of populism has been to entrench private power to a degree that will make it difficult for populists of the future to undo. In seeking to enhance citizens' voice and direct influence over lawmaking, populism can also exacerbate parliamentary factionalism and private-interest group lobbying.

Parts III and IV of the book shift the focus from democracy to constitutionalism, starting with the process by which a constitution is made. Jon Elster opens Part III by addressing, in Chapter 9, those junctures in history when legislatures or national political bodies are called on to create new constitutions. He identifies the problems and perplexities about how best to organize this process. After reviewing numerous mechanisms used in different countries, in different eras, and under varying social and historical conditions, Elster concludes that, on balance, it is preferable to use a special constitutional convention, called together for the purpose of designing and approving a new constitution, rather than to rely on a legislature or parliament sitting as a constituent assembly. The former process is more likely to promote unconstrained deliberation among the participants and to avoid certain biases that might creep into the process. Elster also suggests why, at certain stages, some *in camera* deliberations contribute to a better process.

In Chapter 10, Ruth Gavison also assesses the importance of a constituent assembly as a popular institution for creating a constitution. Moreover, she directly challenges the idea that courts, rather than legislatures, are the most important part of a constitutional regime and thus most susceptible to blame for constitutional results. She is especially concerned with allowing the judiciary too much involvement in the process of constitution making. She concedes that judges play a central role, but on her conception legislatures also have a critical duty to understand and adopt clear positions on constitutional issues. She addresses the traditional counter-majoritarian problem arising out of giving courts an unreviewable say over how constitutions should be enforced. Judicial power in this area is not a necessary

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requirement of democratic constitutions and, furthermore, the design by which courts have this power might derive from a legislative decision in the first place. She disagrees with those theorists (such as Elster) who claim that constitutional conventions, made up of people who are not primarily politicians, provide the best process of constitution making.

Like Gavison, Patricia Hughes understands how legitimacy is a bedrock requirement of a country governed under a constitution. In Chapter 11, Hughes discusses those moments or phases in a country's constitutional evolution when, for various reasons, an impasse might have been reached and legislatures follow a pragmatic course of departing from strict constitutional requirements, in service of the larger goal of maintaining political stability and avoiding crisis. Her term for this condition of reluctance to engage in constitutional definition or reform is "constitutional agnosticism." To illustrate her discussion, she draws on modern political developments in Canada, Israel, South Africa, and Germany. Her study concludes that constitutional agnosticism can sometimes be useful in staving off potentially explosive national debates or delaying full-fledged constitutional debate until more propitious circumstances arise. On the other hand, such agnosticism can also be used unscrupulously, so that legislatures can aggrandize power in ways that would not pass constitutional muster.

Which is the preferable mode for constitutional change: formal constitutional amendment, generally done by legislatures, or periodic common-law updating, generally done by courts? In Chapter 12, Adrian Vermeule argues against those who think that the latter is generally better. He disputes the view that courts are the best institution for change and, to bolster his conclusions, he analyzes those conditions under which each method of change functions best. He also notes the comparative advantages and drawbacks of each process.

Legislatures can change the constitution not only through explicit means, but also implicitly, through ordinary lawmaking. This is the subject of Part IV of the book. Frank Michelman provides a theoretical foundation to the possibility for this type of statutory constitutionalism. In Chapter 13, Michelman draws on contemporary positivist legal theory and analytically attempts to identify the essential differences between constitutions and statutes. He argues that, even though written constitutions are often considered the basic law of a legal system, this is not a necessary characteristic. Moreover, he concludes that ordinary laws enacted by legislatures can perform all the same functions that are thought usually to attach to written constitutions. Michelman's chapter is thus highly relevant to debates over the fetishization of constitutions: They might not have the extraordinary qualities often attributed to them.

In Chapter 14, Elizabeth Garrett considers the phenomenon of framework laws generally. The "framework legislation" that she describes channels the making of future laws and involves substantial delegations of authority. Garrett's aim is to identify and explore the conditions under which a legislature adopts such a scheme for regulating lawmaking on a specific matter (e.g., the budget process) into the future. This kind of statutory regime has quasi-constitutional effects and can enhance the power of party leaders or strategically important committees. It can be used to centralize power and to change the ordinary legislative rules. In that sense, Garrett demonstrates that unlike the case of the fast-track procedure for implementing

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trade agreements, discussed by Thomas in Chapter 4, allowing legislatures to set the self-regulatory mechanism might have a democratic benefit.

A further example of an emerging, new constitutional context in which legislatures operate is under the aegis of a "super-statute," discussed by William Eskridge, Jr., and John Ferejohn in Chapter 15. Such a broad statute can be created without a formal constitutional amendment; it is made by legislators and bureaucrats, rather than by judges; and it can lead to a process of constant change in fundamental legal norms. The authors view this new type of constitutionalism as normatively superior to the traditional account of constitution making that depends on treating a constitution as a basic document to be interpreted primarily by judges. Eskridge and Ferejohn also point to historical instances, such as the civil rights era in the United States, when judges followed legislative leads rather than anticipated them. In support of their normative arguments, the authors emphasize and defend the deliberative aspects required to enact and interpret super-statutes, with publicly accountable reasoning.

Are courts indeed better at interpreting constitutions than legislatures, as conventional wisdom would indicate? Do judges really have many professional or institutional advantages to do a better job of constitutional interpretation? Can legislatures be entrusted with this task? Parts V and VI of the book provide responses to these questions. In Part V, various authors explore constitutional interpretation and application by legislatures both in theory and through looking at modern experiences in the United States and Canada. In Chapter 16, Mark Tushnet discredits arguments that legislators are less competent than judges at interpreting a constitution. In particular, he would dispense with the usual standard for measuring legislative competence – the court-based standard – and substitute for it a better one, which he calls the constitution-based standard. Under the latter standard, one can identify the incentives that legislatures will have to interpret the constitution in compliance with the constitution's provisions. In analyzing the effect of these incentives, Tushnet concludes that legislators might justifiably be expected to interpret the constitution reasonably and that, moreover, judges might have fewer incentives than ordinarily thought. On this basis, the traditional difficulty raised by unelected courts as the final arbiter of constitutional law can be studied and debated in a new light.

In Chapter 17, Sanford Levinson reminds us of the degree to which debates over the meaning of constitutional provisions take place outside courts. He invokes examples from U.S. constitutional history where legislators who were not legally trained reached their own conclusions about what the Constitution compelled. Levinson connects this legitimate capacity on the part of legislators to a theory of constitutional protestantism (similar to that referred to earlier by Hughes in Chapter 11) that entitles each citizen to engage in constitutional interpretation without having to defer to a professional authority. Levinson's discussion thus lends support to the idea of popular, as opposed to privileged, constitutionalism.

Andrée Lajoie offers a corrective to several misapprehensions about the role of legislatures in a constitutional democracy such as Canada's. In Chapter 18, she challenges the widespread notion that courts frequently overturn legislation made by legislators and that this diminishes the elected lawmaker's role. First, she notes that,

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long before the Canadian constitution was amended in 1982, courts were involved in striking down legislation on constitutional grounds. Second, this exercise of judicial power is not capricious – judges must provide valid reasons consonant with what Lajoie sees as dominant Canadian values. Furthermore, by reference to a hermeneutic theory of interpretation, Lajoie concludes that legislators are constantly involved in construing constitutional norms when they make new laws. Lajoie thus might be proposing a type of implicit constitutional interpretation by legislatures, much like the implicit form of constitution making that was discussed in Part IV of the book. In her view, it is important to realize that legislators must engage with the constitution, and in the vast majority of instances, the legislative interpretation of those provisions becomes the operative one.

To deepen our understanding of the frequency with which legislatures, not only during debates of the whole membership but also through the work of specialized committees, have become involved with interpreting and applying the constitution, the chapter by Keith Whittington, Neal Devins, and Hutch Hicken provides elaborate detail about three decades' worth of committee hearings in the U.S. Congress. Their findings in Chapter 19 indicate that committees in conducting normal business have regularly paid attention to issues of federalism, separation of powers, and constitutional rights of citizens. During this period, a new trend has emerged. Increasingly, the Senate judiciary committee has become the dominant forum in Congress where constitutional issues are discussed. The authors explain this trend by considering the backgrounds and skills of the judiciary committee's members, the kinds of social issues frequently encountered, and the appetite of this committee to devote time to debating conflicting constitutional visions.

Part VI of the book deals directly with what we call "legislative constitutionalism." By this we mean that although where there is a constitution, courts play an important role in interpreting it, the final word on constitutional issues belongs to the legislature.[15] Here we ask where one might look for indications that judicial supremacy does not have to be the norm. Is there more than one type of legislative constitutionalism? What are the assumptions of each? The first two chapters of Part VI are sympathetic to legislative constitutionalism. In Chapter 20, Jeremy Webber defines the purpose of a constitution as about more than limiting the exercise of power (and, therefore, it is also about more than the power of courts to oversee the work of legislatures). He reminds us that constitutions also importantly create the institutions of government and provide the design by which democratic decisions can be made. Through the mechanism of the constitution, the public – who

[15] We use this term differently from the way it is used in Robert C. Post and Reva B. Siegel, "Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act" (2003) 112 *Yale L.J.* 1943. Post and Siegel do not have in mind the notion that the legislature's interpretation of the constitution should always prevail over the court's, but rather they propose a "polycentric model" of constitutional interpretation. We prefer to contrast "legislative" as opposed to "judicial" constitutionalism, instead of "legal" versus "popular" constitutionalism, for two reasons. First, under both types of constitutionalism, institutions rather than the polity itself are engaged with interpretation. So the type of constitutionalism should terminologically reflect the institution that does the interpretation. More importantly, calling judicial constitutionalism "legal" and contrasting it with "popular" constitutionalism implies that the people do not care to view their constitution through the prism of legality.

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can be expected to disagree over which position to take – is able nevertheless to voice a coherent will. Webber emphasizes the ideal of democratic participation and treats it as the fundamental principle of constitutional normativity. The upshot is that judges should be relatively modest in reviewing decisions fashioned by democratic means. Moreover, constitutions should be not drafted to provide substantive goals. Instead, they should provide only a framework within which democracy can flourish by heightening the opportunities for citizens to debate the ends of public policy.

Even though conventional wisdom has it that the United States embodies a system of judicial, rather than legislative, constitutionalism, Daniel Farber shows in Chapter 21 that there were few figures in U.S. history who favored legislative supremacy (as opposed to judicial supremacy) over the meaning of the Constitution. In addition, the structure of U.S. government makes it unlikely that the legislative branch could reasonably claim supremacy in this context. Nevertheless, Farber lists ten significant areas that still present opportunities for legislative action by the U.S. Congress to shape an understanding of the Constitution and, if necessary, to overrule judicial doctrine. He also notes that legislators have historically been partly responsible for creating the system of judicial review, and they have demurred from taking all steps they could have to rein in courts on constitutional issues.

The next two chapters are skeptical about legislative constitutionalism. Faithfully holding a torch for judicial supremacy, Owen Fiss rejects the view that legislatures and courts should simply be coordinate bodies of constitutional interpreters. In Chapter 22, he argues that the contemporary movement to retrieve some ground for legislatures, as against courts, so that the former should not have to defer to the latter on constitutional issues, arises out of a disenchantment with the performance of the U.S. Supreme Court over the past four decades. The rise of legislative constitutionalism represents for Fiss a reincarnation of the Critical Legal Studies movement. He agrees that courts should not be the exclusive interpreters of a constitution, but he would defend judicial supremacy against the strong version of legislative constitutionalism. He characterizes proponents of the stronger version as denying that the judicial interpretation of the Constitution should bind the legislature. Fiss thinks that relinquishing judicial supremacy would do some harm. Among other things, it would wreck central constitutional traditions in the United States, including those flowing from the leading decision by the Warren Court that sparked the Second Reconstruction. If judicial precedents of this type were not accorded authority, then the civil rights era could not have happened. Fiss also defends the role of judges as authoritative constitutional interpreters by pointing out that, though not elected, they are part of an overall democratic scheme of governance.

Similarly, Frederick Schauer articulates a case for why judicial review is necessary to constrain legislators in going about their ordinary business of making laws. The central difficulty, as he explains it in Chapter 23, is that governments, even when well-intentioned, will be inclined periodically to circumvent the regulative ideals that they set up or that were set up by a preceding administration. These second-order constraints, as Schauer calls them, can take various forms. They also can be enforced in different ways, as enumerated by Schauer. The sixth constraint in

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