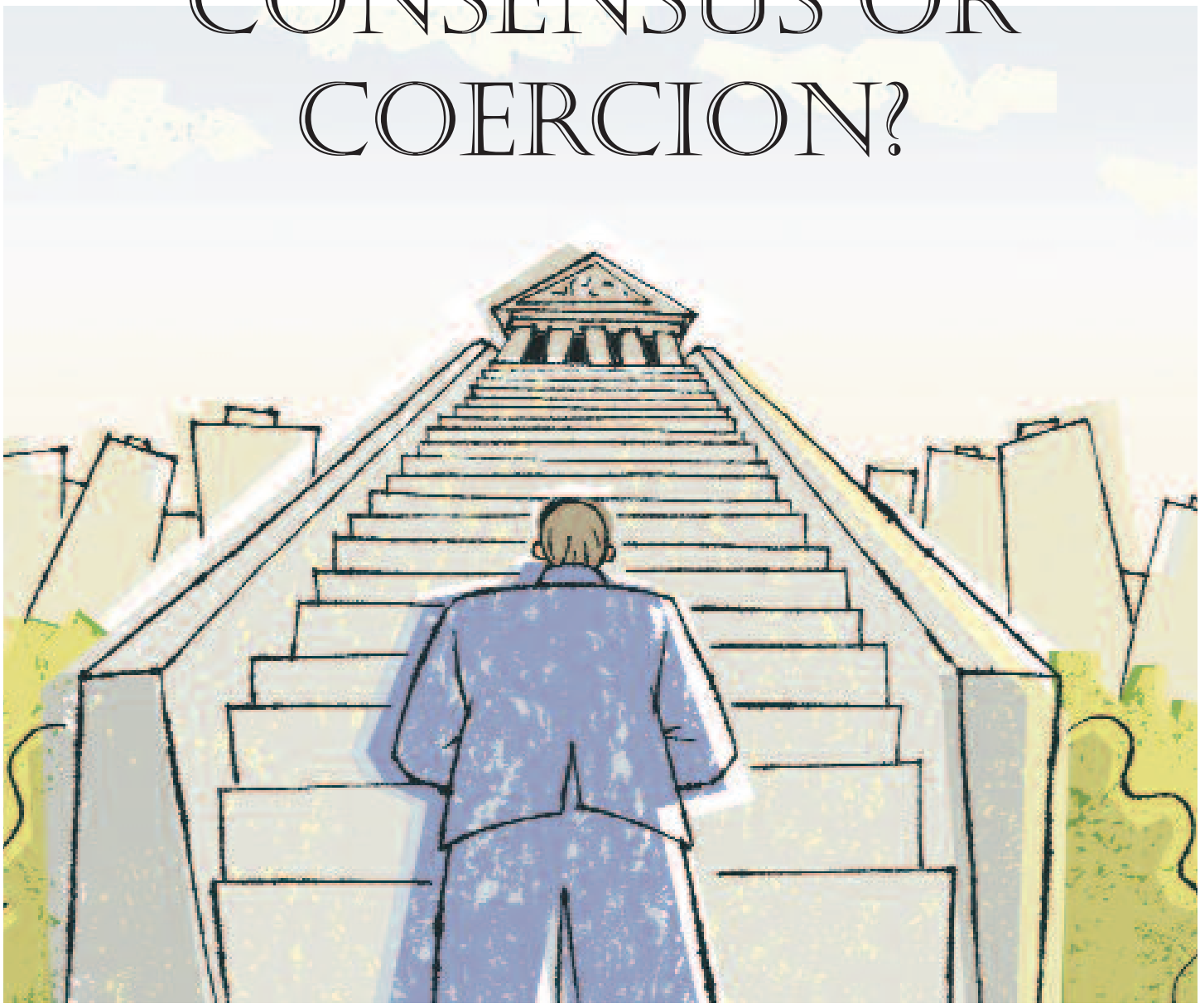
THE SUPREME COURT DECISION: CONSENSUS OR COERCION?



The U.S. Supreme Court is the most powerful court in the world primarily because of the power of judicial review. Judicial review and other factors give the Supreme Court excessive power not explicitly justified in the U.S. Constitution. Given the vagueness and incompleteness of the Constitution, every Supreme Court decision is an interpretation and is, in effect, a constitutional amendment. It follows that Supreme Court decisions must be consistent with the constitutional requirement for an amendment, which means that Supreme Court decisions, assuming the current number of nine justices, must be a supermajority of a minimum of six votes, not the current five, to decide cases in a constitutionally normative manner. The 6-3 rule would also promote what John Rawls calls the "stability" of an increasingly diverse society.

By Joseph Grcic

The power of judicial review is the sweeping power to declare that acts of Congress and state legislatures, decisions of state and federal courts, and acts of the President are unconstitutional. The U.S. Supreme Court is the most influential court in the world, not only because it is the highest court of the most powerful country in the world but also because it has the power of judicial review. The current precedent of 5-4 majority rule, however, gives the Supreme Court excessive power that is not explicitly justified in the Constitution. This power needs to be

curbed by requiring that the Court's decisions, assuming the current number of nine justices, consist of a supermajority of a minimum of six votes, not the current five, to decide cases in a constitutionally normative manner.[1]

There is no constitutional basis for the current 5-4 majority process. The Constitution does not specify the number of justices the Supreme Court must have, nor does it specify the kind of majority required to definitively decide a case. In fact, the history of Supreme Court decision making shows that it evolved over time. During its early years, the justices of the Supreme Court, following the English courts, delivered their opinion seriatim;[2] that is, each justice stated his opinion with no majority opinion per se being defined. During Justice Marshall's tenure as Chief Justice (1801–1835) the Court began offering a single "opinion of the court" in order to make the decision more authoritative and compelling.

Moreover, the power of judicial review is not even explicitly granted by the Constitution but was claimed for the Court by Justice Marshall in his opinion in *Marbury v. Madison* in 1803.[3] Judicial review, whose historic origins can be found in English common law,[4] has been defended by asserting the existence of a divine law or natural law that is higher than positive law to which positive law must conform in order to be valid. The concept has been implied based on the notion of due process found in the Magna Carta of 1215, which held that the king was not above the law. And the idea of the social contract, as found in the writings of John Locke and in the Declaration of Independence, held that there are certain natural rights that define and limit government and that it is the job of the courts to define these rights. These historical justifications are the background of Marshall's defense of judicial review.

In the historic case of *Marbury v. Madison*, Justice Marshall gave the classic defense of judicial review.[5] However, Marshall's case for judicial review is not particularly compelling. First, Marshall argued that the purpose of the Constitution was to create a form of limited government and that judicial review performs that function. However, such an argument does not compel the requirement of judicial review because of the availability of other instruments to limit government, including regular elections, checks and balances, and the Bill of Rights. Marshall also noted that justices take an oath to support the Constitution. But this too is not particularly significant, because all judges, members of Congress, and presidents take the same oath. Finally, Marshall argued that the Supremacy Clause of the Constitution (Article XI) states that the Constitution "shall be the supreme law of the land." However, most constitutional historians believe that the Supremacy Clause was addressed to the state legislatures and state courts; therefore, the clause does not necessarily imply the existing practice of judicial review.

Another defense of judicial review is related to the idea of federalism. Although federalism is not clearly defined, it is understood as a sharing of governing power between the states and the federal government. Justice Oliver Wendell Holmes argued that the Court must have the power to declare a state law unconstitutional if the union is to be preserved.[6] This may well be so, and the Judiciary Act of 1789 explicitly gives the Court this power, but it does not mean that federalism implies that the Supreme Court must have the power to declare an act of Congress unconstitutional.[7]

Judicial review is also problematic for reasons dealing with the political nature of the appointment and confirmation process and the very nature of the Constitution itself.[8] The Supreme Court is political in the broad sense of the term: its decisions influence the distribution of the rights, duties, and interests of millions of the country's citizens. The Court is also political in the narrow sense of the term as a result of the influence of justices' partisan ideologies. Justices are appointed by the President for at least partly political reasons in that the President seeks justices whose ideology and understanding of the Constitution is consistent with his own. Presidential election campaigns use the idea of likely Supreme Court appointments as reasons to vote for or against a particular candidate. The Senate often votes on Supreme Court nominees along party lines. During the confirmation process, senators examine nominees and question them about their judicial philosophy and overall ideology in order to determine their political leaning and likely future rulings once they are on the Court. Moreover, without an appointment with a mandatory specific end point, justices often postpone their retirement until a President with similar political ideology is elected and nominates a replacement who has a similar ideology.

There are other concerns with the Supreme Court as well. As a formal institution, the Court has rules and a structure that define its role within the federal system and society as a whole. However, every institution has customs, personalities, friendships, and ideological differences that also play a role in the way the Court functions. The role of the swing vote on the Court is of particular concern. The swing voter is usually considered a moderate or an independent voter who sometimes votes with one ideological group and at other times with another. For example, the now-retired Justice Sandra Day O'Connor is a justice who was not an obvious member of any camp or ideological group of the Court. The power of the swing justice is too great in a 5-4 rule system. No justice, and no justice's ideological preferences and personality, should influence the Court's decision to such a degree. A rule of 6-3 majority would reduce the power of any one justice and thus make the decision less a reflection of the ideology or idiosyncrasies of one judge and give the decision a broader rationale; a 6-3 majority would also shift power to the states in the event that a majority of six justices is not attained.

The justices' personalities, ideologies, and limitations raise a related problem: the possibility of error. In a controversial 5-4 ruling on gay rights in *Bowers v. Hardwick* in 1986, Justice Lewis Powell voted with the majority. Later, after he retired, he admitted that he had "probably made a mistake."[9] The *Bowers* decision was overturned later in *Lawrence v. Texas* (2003). Of course, a 6-3 majori-

ty ruling would not have rendered a decision in favor of gay rights at the time of *Bowers*, but it would have left it up to the states to decide the issue.

The nature of legal reasoning raises an additional concern about the Supreme Court's decision-making process. Legal reasoning is by no means a deductive science; rather, it is inductive and analogical.[10] Legal decisions must take into account the Constitution, the various statutes, the facts, and precedent. Analogical arguments are based on treating like cases alike, but no two cases are exactly alike. Whether two cases are deemed "alike" depends on the "facts" and the "relevant" legal principles, both aspects of which are at least in part a function of the justices' ideology or interpretive theory. Precedent or the rule of stare decisis is not a foolproof guide; justices may ignore and overturn precedent, and they have done so frequently. It seems fairly clear that all interpretations and reasoning involve presuppositions; to attempt to prove every presupposition involves an infinite regression. This inexactness of legal reasoning adds another level of indeterminacy to the Court—a factor that further supports the implementation of a 6-3 majority for Supreme Court decisions.

Another feature of the Court that is relevant to the nature of its decisions is that constitutional principles and statements, especially those concerning the Bill of Rights, are often abstract, vague, and incomplete and hence difficult to interpret accurately. Historians agree that the actual drafting of the Constitution was a compromise between differing ideologies and conflicting interests that required vagueness as a precondition for reaching consensus.[11] Many have argued that the Constitution must be vague and indeterminate in part to be relevant and useful in future unforeseen and, to the framers, unforeseeable circumstances.[12] Even Justice William Rehnquist stated, "The framers of the Constitution wisely spoke in general language and left to succeeding generations the task of applying that language to the unceasingly unchanging environment in which they would live. … They [gave] latitude to those who would later interpret the instrument to make that language applicable to cases that the framers might not have foreseen."[13] The ambiguity, vagueness, and flux of language as well as social, cultural, moral, and scientific changes further exacerbate the problem of judicial review.

The historical origins and brevity of the Constitution have produced various conflicting theories as to its proper interpretation. Theories of the interpretation of the Constitution are complex, but for the purposes of this essay a brief characterization is necessary.[14] Those who favor what is sometimes called "strict constructionism" seek a more constrained Supreme Court and believe that its power can be curbed by adopting "textualism" as a method of interpreting the Constitution. Textualism holds that the literal text of the Constitution—not intent or some assumed underlying unstated principle—must be the standard for interpreting the Constitution if the rule of law and unwarranted judicial activism is to be controlled. Textualism denies that the actual words are vague and indeterminate to such a degree as to be useless; rather, the idea holds that the semantic meaning of the words of the Constitution is sufficiently clear to allow the Court to reach definitive judgments in most cases. Defenders of this view hold that, without textualism, there would be no reason to have a Constitution at all.[15]

There are problems with textualism as a way to interpret the Constitution and limit the Court. Although some terms of the Constitution are clear, such as limiting a President's term to "four years," there are also pivotal terms in the Constitution, such as "equality" and "rights," which have an open texture and are fundamentally indeterminate. Another difficulty with this view is that, even when the terms are fairly clear, they are not always sufficient to determine meaning. An example often given is the First Amendment, which clearly states that "Congress shall make no law … abridging the freedom of speech, or of the press. …" To accept the literal meaning of this amendment would imply that there would be no laws on perjury, libel, or falsely yelling "fire" in a crowded theater. Defenders of textualism usually respond to this argument by saying that this interpretation is not what the framers "intended." Thus, textualism must go beyond the lexical semantic meaning and must appeal to the framers' intentions to clarify meanings. This need introduces the theory of interpretation known as "originalism."

Originalism is the view that interpretation of the Constitution must be based on the original intent of the framers.[16] Like textualism, this view of the Constitution is defended by those who seek to limit the Court's power. For example, in passing the Eighth Amendment prohibiting "cruel and unusual punishment," the framers did not intent to outlaw the death penalty, because we know they implemented it extensively in their time. The intent clarifies meaning and can then be used to judge cases.

Originalism has its critics as well.[17] It is not clear whose intentions must be uncovered—those of the framers or those of the framers who voted for the amendment. Often the intentions are not clear or they conflict with one another. Moreover, in light of contemporary moral standards, some intentions—such as the framers' apparent intent to limit voting rights to white men who own property—may be considered immoral today.

In addition, some support the theory of the "living" Constitution,[18] because they refuse to impose what they see as the dead hand of the past on contemporary society. Proponents of this theory claim that the Constitution must be interpreted according to the evolving moral understanding and social realities of the times. For example, the debate on the Eighth Amendment and the death penalty must be interpreted in the light of the current scientific understanding of the causes of crime, the nature of human psychology, and the emerging moral consensus. To reject this understanding of the Constitution would lock the Supreme Court into being ruled by the dead with their acceptance of slavery, denial of women's right to vote, and other actions that are deemed immoral by the expanding contemporary moral consensus.

Even though the theory of the living Constitution has

many supporters, this view also presents some difficulties.[19] First, the theory tends to weaken the meaning of the Constitution as a clear limit on government and as a constituent of the rule of law. It also seems to negate the amending function built into the Constitution, replacing it with the ideological perspectives of the justices. This view of the Constitution would make the judiciary another legislature. As Justice Scalia quoted approvingly, "Judge-made law is ex post facto law, and therefore unjust."[20] This theoretical approach seems to weaken the Constitution as a meta-rule or a framework for governmental functioning.

There are other theories of constitutional interpretation but none are generally accepted. As Justice Scalia has stated, "We American judges have no intelligible theory of what we do most."[21] The lack of consensus and indeterminacy not only at the level of constitutional meaning but also at the meta-level of the appropriate method of interpretation make the Court's functioning itself more indeterminate. Moreover, even if there were an agreed-upon theory of interpretation, there seems to be no legal way to compel justices to apply this theory in their actual deliberations. Hence, the Court is again without sufficient structure and the rule of law is in jeopardy; but there is a way out of this apparent impasse.

The living Constitution theory is correct in that it is impossible to know exactly what the framers intended, and, even when one could know their intent, it may be immoral, irrelevant, or unwarranted according to contemporary standards. The textualists and originalists are also correct in their view that departing from the text of the Constitution leads to legislation to varying degrees. But that outcome is inevitable for three reasons.

First, it is impossible to know with certainty what the framers intended; and establishing intent implies other conditions and complications. It requires one to understand the context in which the framers created the document as well as the cultural, philosophical, and political context within which the framers drafted it. For example, in order to understand the Constitution, one must understand the political climate of the times as well as the philosophical ideas expressed in the Declaration of Independence, which can be traced back to the philosophy of John Locke, some of whose ideas can be traced back to the Magna Carta and the struggle for parliamentary supremacy. Establishing the context of a period of history long gone is problematic and, at the very least, a speculative exercise in imaginative reconstructionism.

Second, to understand any part of the Constitution requires that the whole document be properly interpreted and understood, and to understand the whole one must understand the parts. This dialectical process or "hermeneutical circle" is, in part, a subjective process and not objectively definable, because one cannot determine and be fully aware of all the presuppositions the interpreter is applying in a subconscious manner throughout the process.[22]

Third, the framers, as all human beings, were morally and intellectually limited; hence, their views cannot be deemed infallible or unchangeable. But what is most important is that interpreting the Constitution means adding greater specificity and clarity of meaning to the law and, as such, this creates a new norm, which means legislating to some degree—that is, to interpret is, in effect, to define and make the indeterminate Constitution more determinate, which is tantamount to a legislative act. To give meaning to a vague statement is to change it by giving it content and making it more specific, thus eliminating other possible interpretations (at least for a time) in some way; this means creating a new law. Thus, to create a new interpretation of the Constitution is in effect to amend the Constitution—an aspect that also supports the adoption of a 6-3 majority rule.

The Constitution holds that an amendment requires a two-thirds majority of both houses (and three-fourths of the states). (Other conditions hold for a constitutional convention.) The 6-3 majority rule corresponds to the two-thirds rule for Congress; thus, because both branches of government are de facto altering the Constitution, the rule for altering should be the same: two-thirds of the members of Congress and two-thirds of the justices of the Supreme Court, or a minimum majority of six justices.

The 6-3 majority rule would also promote what John Rawls calls the "stability" of an increasingly diverse society. According to Rawls, a stable society is one that meets three conditions:

- A stable constitutional society is one that must "fix, once and for all, the basic rights and liberties, and to assign them a special priority."
- The basic structure of a stable society is the basis of "public reason" and the basic institutions encourage the virtues of "public life" and "fairness." By "fairness" Rawls means that institutions satisfy the two principles of justice and that one has "voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."
- A stable society is one whose "basic institutions should encourage the cooperative virtues of political life." These virtues are those of "reasonableness and a sense of fairness, and of a spirit of compromise and a readiness to meet others halfway."[23]

Stability implies the rule of law, which requires laws to be rational, universal, impartial, and consistent. Rationality of law means that the law must be sufficiently justified and clear. Universality means that the law must apply to all persons, including those in power. Impartiality means that the law applies to persons only on the basis of certain valid criteria. Consistency means that similar cases must be treated similarly. The rule of law is a barrier against arbitrary power and views the law as the basis of social order and conflict resolution.

The 6-3 rule would enhance Rawls' ideals of stability and the rule of law, because making the Court's rulings more broadly based would tend to reduce the Supreme Court's reversals of rulings or inconsistent rulings on basic rights. The 6-3 majority rule would also be more consis-

tent with Rawls' ideals of reasonableness and fairness, because the Court's rulings would be more likely to be more in harmony with what Rawls calls the "overlapping consensus"—the agreement about basic rights that is found in the various "comprehensive doctrines" that exist in a modern pluralist society.[24] This would be the outcome, because the Court's decisions would be more congruent with the overlapping consensus as a result of the need to encompass greater ideological differences among the justices. Moreover, many issues would have to be settled by state law and other democratic processes rather than by Court decision, thus preserving a positive pluralism that would otherwise be in jeopardy because of top-down rulings.

The Supreme Court is a pillar of federalism and of the constitutional system of checks and balances. However, in an increasingly diverse society, the legitimacy of the Court—and hence stability—becomes more problematic, especially in light of the fact that judicial review is not likely to be abandoned.[25] If the above arguments are plausible, then the political nature of Supreme Court appointments, the vagueness of the Constitution and conflicting theories of constitutional interpretation, the role of human limitations, the imprecise nature of legal reasoning, and the importance of stability—all these considerations require that the nature of the Supreme Court's decision-making structure be changed to the 6-3 majority rule. A change in the minimum number of justices required for a Court decision would enhance its legitimacy as an instrument of the rule of law, not the destabilizing rule of raw political power. **TFL**

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Endnotes

[1]Though not argued for here, the "rule of four," which requires that four justices agree on which petitions would receive a hearing in the Court, should be changed to the "rule of five." The rule is not specified in the Constitution nor in any act of Congress but was simply developed by the justices themselves.

[2]G. Edward White, The Marshall Court and Cultural Change, vol. 3–4, 182–191 (New York: Macmillan, 1988). To be sure, judicial review also has established limits, though generally these "limits" are not well defined. For example, the Court can hear only actual disputes and not purely intellectual queries. Only those with "standing"—that is, a stake in the outcome—can be heard in the Court. Also, the Court does not hear "political questions," which are of three main categories: (1) proper procedures for amending the Constitution, (2) guarantees of a republican form of government to each state (Article IV, Section 4); (3) foreign affairs, such as the recognition of foreign countries. And finally, the rule of "ripeness" holds that the Court cannot hear an appeal until other avenues of appeal have been exhausted; David M. O'Brien, Constitutional Law and Politics, 115 (4th ed., New York: Norton, 2000).

[3]*Marbury v. Madison*, 5 U.S. 137 (1803).

[4]Jerre Williams, Constitutional Analysis, 2–11 (St. Paul: West, 1979).

[5]*Id.*, 16–23.

[6]Kermit L. Hall, The Supreme Court of the United States, 405–409 (Oxford and New York: Oxford Univ. Press, 1992).

[7]George Lee Haskins, History of the Supreme Court of the United States, Vol 2: Foundations of Power: John Marshall, 1801–15, 182–185 (New York: Macmillan, 1981).

[8]Richard Davis, Electing Justice, 7–9 (Oxford and New York: Oxford Univ. Press, 2005).

[9]Hall, Supreme Court of the United States, 80; *see also* Bob Woodward and Scott Armstrong, The Brethren, 87–96 (New York: Simon and Schuster, 1979).

[10]Laurence Tribe and Michael Dorf, On Reading the Constitution, 87–96 (Cambridge: Harvard Univ. Press, 1991).

[11]Akhil Amar, America's Constitution, 7–28 (New York: Random House, 2005).

[12]Tribe and Dorf, On Reading the Constitution, 13 (Cambridge: Harvard Univ. Press, 1991).

[13]Amar, America's Constitution, 34.

[14]Hall, Supreme Court of the United States, 183–187.

[15]Antonin Scalia, A Matter of Interpretation, 126–127 (Princeton: Princeton Univ. Press, 1997).

[16]Robert H. Bork, The Tempting of America, 143–150 (New York: The Free Press, 1990); Keith Whittington, Constitutional Interpretation, 3–4 (Lawrence: Univ. Press of Kansas, 1999).

[17]Hall, Supreme Court of the United States, 187–189.

[18]*Id.*, 190–192.

[19]*Id.*, 191.

[20]Scalia, A Matter of Interpretation, 10.

[21]*Id.*, 14.

[22]Robert D'Amico, Contemporary Continental Philosophy, 155 (Boulder: Westview Press, 1999).

[23]John Rawls, A Theory of Justice, 454-455 (Cambridge: Harvard Univ. Press, 1971); John Rawls, Justice as Fairness, 115–117 (Cambridge: Harvard Univ. Press, 2001); James Sterba, How To Make People Just, 26–27, 67–68 (Totowa, N.J.: Rowman & Littlefield, 1988).

[24]John Rawls, Political Liberalism, 10–15, 150–154 (New York: Columbia Univ. Press, 1993).

[25]For example, the decision reached in *Bush v. Gore*, 531 U.S. 98 (2000).